130-232

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 211.

LIZZIE BUXTON AND ANNA J. VOORHEES, PLAINTIFFS IN ERROR,

vs.

HATTIE L. TRAVERS, MARGARET WRIGHT, WILLIAM T. SIMMS, AND MILES SHOEMAKER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED JANUARY 2, 1886.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, OCTOBER 10, 1888.

1 *Transcript on Appeal.*

In the Supreme Court of the State of California.

LIZZIE BUXTON *et al.*, Plaintiffs and Appellants,
vs.
HATTIE TRAVER *et als.*, Defendants and Respondents. } No. 9809.

John H. Dickinson, attorney for appellants; Satterwhite & Curtis, attorneys for respondents.

Endorsed: Filed November 28th, 1884. J. W. McCarthy, clerk, by Frank Meyers, deputy clerk.

2 *Transcript on Appeal.*

In the Supreme Court of the State of California.

In the Superior Court of the County of San Bernardino, State of California.

LIZZIE BUXTON and ANNA J. VORHEES, Plaintiffs,
vs.
HATTIE L. TRAVER, MARGARET WRIGHT, WILLIAM T. SIMMS, and MILES SHOEMAKER, Defendants.

Complaint.

Plaintiffs complain of defendants and allege—

First. That on or about the 2d day of February, 1870, one
3 Oscar Traver settled upon that certain tract of land situate in San Bernardino county, California, known and described as the north one-half of the southeast quarter of section 34, township 2 south, range 5 west, San Bernardino meridian, and from that date thereafter up to the time of his death lived upon, improved, and cultivated said tract of land.

Second. That at the time of said settlement and continuously thereafter until the first day of July, 1879, said land was public land and the property of the United States, unoccupied and unsurveyed and subject to the right of pre-emption, and no approved plat of the township embracing said tract of land had been received at the United States district land office at Los Angeles, California, which was and is the district in which said land was and is situated prior to July 1st, 1879.

Third. That at the time said Oscar Traver settled upon said land and continuously thereafter until his death, on the 2d day of January, 1877, he was a citizen of the United States and over the age of twenty-one years and entitled to have and accept the benefit of the pre-emption and homestead laws of the United States and had never had the benefit of any right of pre-emption and was not the owner

of 320 acres of land in any State or Territory, and he settled
4 upon and improved said land and erected a dwelling thereon in good faith to appropriate it to his own exclusive use and at all times intended to acquire a title thereto from the United States as soon as he possibly could and not to sell the same on speculation; neither did he ever, directly or indirectly, make any agreement or contract in any way or manner with any person by which the title he might acquire from the United States should inure in whole or in part to the benefit of any person except himself.

Fourth. That said Oscar Traver, on the 21st day of March, 1871, executed, acknowledged, affixed upon said land, and on March 23rd, 1871, caused to be recorded in the book of possessory claims, records of San Bernardino county, California, his affidavit in due form as required and provided by the act of the Legislature of California entitled "An act prescribing the mode of maintaining and defending possessory actions on public lands in this State," approved April 20th, 1852, and of the acts supplemental thereto and amendatory thereof.

Fifth. That at the time of his settlement on said land said Oscar Traver was a single person and continued such single person up to the 13th day of December, 1870, on which last date he inter-
5 married with the defendant, Hattie L. Traver. She continued to be his wife until the death of Oscar Traver, which took place on the 2nd day of January, 1877.

Sixth. At his death said Oscar Traver left him surviving his wife, said defendant, Hattie L. Traver, and his daughters, Lizzie and Anna J., both of whom have married and are respectively the plaintiffs herein; that the defendant, Hattie L. Traver, and the plaintiffs were the only heirs-at-law of the said Oscar Traver.

Seventh. That the said Oscar Traver left no last will, and there has not been any administration upon the estate.

Eighth. When said Oscar Traver died he was entitled to claim the benefit of the pre-emption and homestead laws of the United States, and was the head of a family as to said land; that on the 16th day of July, 1878, said Hattie L. Traver filed in said United States district land office at Los Angeles her pre-emption declaratory statement No. 1617 describing said land, alleging settlement thereon on the 2nd day of February, 1870, declaring her intention to claim the same under the pre-emption laws of the United States; that on the 6th day of November, 1878, she changed said pre-emption declaratory statement upon said land into a homestead entry
6 thereof, original entry No. 412 in said district land office, and thereupon and upon November 10th, 1879, she obtained from and the United States issued to her its patent for said land, which patent is still in full force and effect, and has never been cancelled or annulled.

Ninth. That shortly after the death of said Oscar Traver said Hattie L. Traver, who at the time resided upon said land, wrote and caused to be delivered to the plaintiff, Anna J., a letter informing the plaintiffs, who then and ever since have resided in San Francisco, California, of the death of their said father, and repre-

senting and stating to them that he had not left any property whatever, and that said representation was made with the intent to deceive the plaintiffs and to prevent them from filing the necessary papers to complete the said pre-emption and homestead rights of the said Oscar Traver, and the plaintiffs were deceived thereby and prevented from completing said rights; that on or about the first day of December, 1882, for the first time plaintiffs discovered that the defendant, Hattie L. Traver, had completed said rights and had obtained said patent, which information they then obtained from a friend of their deceased father, who was visiting in San Francisco.

Tenth. That since the death of said Oscar Traver the de-
7 fendant, Hattie L. Traver, has lived upon and occupied said land and received and kept to her own use and benefit the rents, issues, and profits thereof.

Eleventh. That the annual value of the rents, issues, and profits of said land since the death of said Oscar Traver, as plaintiff is informed and believes, and therefore alleges the fact to be, has been and is the sum of $2,500.00, and the said land is of the value of $1,000.00 per acre.

Twelfth. That the defendants, Margaret Wright, William T. Simms, and Miles Shoemaker, claim each of them an interest in said land by right of purchase from the defendant, Hattie L. Traver; but plaintiffs, upon their information and belief, allege that they and each of them have at all times had actual notice of plaintiffs' interests in said lands, and such pretended purchases were and are without consideration and void.

Thirteenth. That said defendant, Hattie L. Traver, denies the interest of plaintiffs or of either of them in said land or in the rents, issues, and profits thereof, and repudiates their claim thereto.

Wherefore plaintiffs pray judgment—

1st. That the defendant, Hattie L. Traver, is a trustee for plaintiffs of an undivided half interest in said land and in the rents, issues, and profits thereof.

8 2nd. That the defendants Wright, Simms, and Shoemaker have no interest in said land or in any portion thereof.

3rd. That said Hattie L. Traver account with plaintiffs and pay over to them their one-half interest in the rents, issues, and profits of said land in equal shares of one-fourth to each.

4th. That plaintiffs have such other and further relief as to the court shall appear just.

JNO. H. DICKINSON,
Attorney for Plaintiffs.

Endorsed: Filed August 8th, 1884. W. F. Holcomb, clerk.

Demurrer.

(Title of court and cause.)

The defendants demur to plaintiffs' complaint on the following grounds:

1st. Said complaint does not state facts sufficient to constitute a cause of action.

2nd. It appears upon the face of said complaint that plaintiffs' cause of action is barred by the provisions of section 339, subdivision 1, of the code of civil procedure.

SATTERWHITE & CURTIS,
Attorneys for Defendants.

Filed Aug. 22nd, 1884.

9 *Judgment.*

(Title of court and cause.)

IN OPEN COURT, *October* 28, 1884.

In this action the defendants appear by Satterwhite & Curtis, their attorneys, and the plaintiffs do not appear. The demurrer to the complaint heretofore submitted and taken under advisement is now by the court sustained; and it is therefore adjudged that the plaintiffs take nothing by their action, but that their action be dismissed, and that the defendants have and recover from the plaintiffs their costs necessarily expended or incurred in this action, amounting to $——.

Judgment recorded October 28, 1884, Book 2, page 149, Superior Court Judgments.

Notice of Appeal.

(Title of court and cause.)

Take notice that the plaintiffs in the above-entitled action hereby appeal to the supreme court of this State from the order sustaining the demurrer and the judgment therein made and entered in the said superior court on the 28th day of October, 1884, in favor of the defendants in said action and against said plaintiffs, and from the whole thereof.

Yours, etc.,
JNO. H. DICKINSON,
Attorney for Plaintiffs.

10 To the clerk of said court and Satterwhite & Curtis, attorneys for defendants.

Dated this 10th day of November, 1884.

Endorsed: Filed Nov. 13th, 1884. W. F. Holcomb, clerk.

Service and receipt of a copy hereof admitted after filing this 13th day of November, 1884.

SATTERWHITE & CURTIS,
Attorneys for Defendants.

Stipulation.

(Title of court and cause.)

It is hereby stipulated that the foregoing is a full, true, and correct copy of the judgment roll in the above-entitled action and of the notice of appeal filed and served therein; that said papers constitute the transcript on appeal herein; and we do further certify that undertakings in due form were properly filed on November 13th, 1884.

JNO. H. DICKINSON,
Attorney for Plaintiffs.
SATTERWHITE & CURTIS,
Attorneys for Defendants.

11 *Submission of Cause.*

In the Supreme Court of the State of California.

1885.
April 7. Filed stipulation to submit on briefs.
April 10. Ordered submitted upon briefs on file.
July 28th. Ordered that remittitur be stayed five days from date.

ROSS, *J.*
McKEE, *J.*
McKINSTRY, *J.*
THORNTON, *J.*

12 In the Supreme Court of the State of California, Department One.

LIZZIE BUXTON and ANNA J. VORHEES, Appellants,
vs.
HATTIE L. TRAVERS, MARGARET WRIGHT, WILLIAM T. SIMMS, and MILES SHOEMAKER, Respondents.
No. 9809.

On appeal from the superior court in and for the county of San Bernardino.

And now, at this day, this cause being called and having been heretofore submitted and taken under advisement and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by McKee, J.

We concur.

ROSS, *J.*
McKINSTRY, *J.*

Whereupon it is adjudged and decreed by the court that the judgment of the superior court in and for the county of San Bernardino in the above-entitled cause be, and the same is hereby, affirmed with costs.

13 [Endorsed:] No. —. In the supreme court, State of California. Remittitur. —— —— *vs.* —— ——. Clerk's costs, $—; paid by appellant, $—; paid by respond't, $—; total, $—. —— ——, clerk, by —— ——, deputy.

14 *Opinion.* (*Filed June* 25, 1885.)

In the Supreme Court of the State of California, Department One.

BUXTON *vs.* TRAVER *et al.* } No. 9809.

Appeal from a judgment of dismissal entered on sustaining a general demurrer to the complaint.

The complaint shows that the plaintiffs are daughters and the defendant, Hattie Traver, the widow of Oscar Traver, deceased; that Oscar Traver died in the year 1877 in possession of the tract of land described in the complaint, leaving surviving him the said widow and two daughters as his sole heirs-at-law; that after his death the widow continued to reside on the land, and in November, 1879, she made a homestead entry upon it and on the 10th of November, 1879, obtained for it a patent from the United States. This patent the plaintiffs claim inures to the benefit of the heirs-at-law of the deceased, and the object of the suit in hand is to have the widow, as the recipient of the United States patent, declared their trustee of an undivided one-half interest in the land and of the rents, issues, and profits of the same.

They base this claim upon section 2269 of the United States Revised Statutes, which is as follows:

"Where a party entitled to claim the benefits of the pre-emption law dies before consummating his claim, by filing in due time all the papers essential to the establishment of the same it shall be competent for the executor or administrator of the estate of such party or one of the heirs to file the necessary papers to complete the same; but the entry in such cases shall be made in favor of the heirs of the deceased pre-emptor, and a patent thereon shall cause the title to inure to such heirs as if their names had been specially mentioned."

Of the validity of this statute there is no question. (Elliot *vs.* Figg, 59 Cal., 117.) But it has no reference to an entry made under the homestead laws of the United States; it refers only to an entry made in consummation of a claim of right to land asserted, under the pre-emption laws of the United States, by a pre-emptor who dies before completing his claim by filing the requisite papers. In such a case the statute extends the right after the death of the pre-emptor to his executor or administrator or any of his heirs-at-law to complete the claim initiated by him by filing the papers necessary for the purpose and to enter the land for the benefit of all the heirs; but the complaint contains no case under the statute. Its

statement of facts shows that the land patented to the defendant Hattie was, in the year 1870, part of the unsurveyed public land of the United States open to pre-emption; that Oscar Traver settled upon it that year with the intention of acquiring title thereto from the United States as soon as he could; that he was a duly qualified pre-emptor, and in that capacity resided on the land with his family, consisting of the plaintiffs and the defendant Hattie, until his death, in 1877; that he died without leaving a last will and there was no administration of his estate, and it appears that neither the widow nor the plaintiffs nor either of them after his death suggested or presented any claim initiated by him or filed any papers for the purpose of completing such a claim, if it existed, or took any steps for the entry of the land under the pre-emption laws for the benefit of the heirs. It is alleged, however, that the widow continued to occupy the land after his death, and it is charged that it was her duty to complete the pre-emption of the deceased and enter the land for the benefit of the heirs; that she did not perform that duty, but instead fraudulently communicated to the plaintiffs as fact that their father died without leaving any property, and thus prevented them from establishing their father's claim by the requisite proof, and then entered the land in her own name and for her own behoof.

There is no averment in the complaint that the fact communicated to the plaintiffs was not true, and it is admitted that the approved plat of the township on which the land is situated was not filed until the 1st of July, 1879—more than two years after the death of Oscar Traver. At the time of his death Traver was, therefore, a mere occupant of the land, as a portion of the unsurved public land of the United States, for the pre-emption of which he had taken no steps required by the pre-emption law. In that position he had a mere privilege of pre-emption; but such a privilege is not a title, legal or equitable; it is only a proffer to a certain class of persons that they may become purchasers if they will, but without payment or an offer to pay it confers no equity. A right is conferred by it only when the party has accepted the offer by claiming the benefit of the statute in the proper manner and within the required time or by payment. (Grand Gulf R. R. Co. *vs.* Bryan, 8 S. & M., 268; Hutton *vs.* Frisbie, 37 Cal., 475; Frisbie *vs.* Whitney, 9 Wall., 187; the Yosemite Valley case, 15 *id.*, 77.) Until there is an offer to do what the pre-emption laws require to be done to initiate and prosecute a pre-emption right there is no existing claim of the settler to pre-empt which can be completed after his death by his heirs or his administrator, and as no such claim was initiated and prosecuted by him in his lifetime he acquired no proprietary interest in the land which upon his death would descend to his heirs and clothe them with an equitable right to control the patent to the land subsequently issued by the United States upon an entry made by another.

As therefore the original settler died without making any claim to the benefits of the pre-emption laws which could be perfected by his heirs, and as no equitable right in the land descended to the

heirs, the patent issued to the defendant Hattie upon her entry under the homestead laws is not subject to a trust in favor of the plaintiffs (Jarvis *vs.* Hoffman, 43 Cal., 314), and the court did not err in sustaining the demurrer and entering judgment for defendants.

Judgment affirmed.

McKEE, *J.*

We concur.

ROSS, *J.*
McKINSTRY, *J.*

15 *Bond.*

In the Supreme Court of the United States.

LIZZIE BUXTON *et al.*, Plaintiffs in Error,
vs.
HATTIE L. TRAVERS *et al.*, Defendants in Error.

Whereas Lizzie Buxton and Anna J. Vorhees, plaintiffs and plaintiffs in error in the above-entitled cause, have presented a writ of error to the Supreme Court of the United States to re-examine the final judgment of the supreme court of the State of California in the said cause:

Now, therefore, in consideration of the premises, we, the undersigned, householders of the city and county of San Francisco, in the State of California, do hereby jointly and severally undertake and promise that the said Lizzie Buxton and Anna J. Vorhees, plaintiffs in error, shall prosecute their writ of error to effect, and if
16 *she* fail to make their plea good shall answer all the damages and costs, not exceeding five hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

Dated this 5th day of August, 1885.

J. H. MEREDITH. [SEAL.]
FRANK BUXTON. [SEAL.]

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*

J. H. Meredith and Frank Buxton, being sworn severally, each for himself says that he is the person named in and who subscribed the foregoing bond; that he is a householder and resident within the State of California, and is worth the amount specified in said bond over and above all his just debts and liabilities, exclusive of property exempt from execution.

J. H. MEREDITH.
FRANK BUXTON.

Subscribed and sworn to before me this 5th day of August, 1885.

[NOTARIAL SEAL.]

LEE D. CRAIG,
Notary Public.

Approved by me August 10th, 1885.

R. F. MORRISON,
Chief Justice.

(Endorsed:) Filed August 10, '85. J. W. McCarthy, clerk, p'r J. S. Williams, deputy.

17 UNITED STATES OF AMERICA, *ss:*

To Hattie L. Travers, Margaret Wright, William T. Simms, and Miles Shoemaker, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1885, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein Lizzie Buxton and Anna J. Vorhees are plaintiffs and plaintiffs in error and you are defendants and defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Robert F. Morrison, chief justice of the supreme court of the State of California, this 4th day of August, A. D. 1885, and of the Independence of the United States the one hundred and tenth.

R. F. MORRISON,
Chief Justice.

18 [Endorsed:] 9809. In the Supreme Court of the United States. Lizzie Buxton *et al.*, pl'ffs & pl'ffs in error, *vs.* Hattie L. Travers *et al.*, def'ts & def'ts in error. Citation. Filed August 10, '85. J. W. McCarthy, clerk, per J. S. Williams, deputy.

19 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of California, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said supreme court before you, between Lizzie Buxton and Anna J. Vorhees, plaintiffs and plaintiffs in error, and Hattie L. Travers, Margaret Wright, William T. Simms, and Miles Shoemaker, defendants and defendants in error, a manifest error hath happened, to the great damage of the said plaintiffs and plaintiffs in error, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next,

in the said United States Supreme Court to be then and there held, that, the record and proceedings aforesaid be- inspected, the said United States Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 4th day of August, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the one hundred and tenth.

[The Seal of the Circuit Court, District of Cala.]

(Signed) L. S. B. SAWYER,
Clerk U. S. Circuit Court, District of California.

The above writ of error is hereby allowed.

—— ——.

20 [Endorsed:] Copy. 9809. United States Supreme Court. Lizzie Buxton *et al.*, pl'ffs & pl'ffs in error, *vs.* Hattie L. Travers *et al.*, def'ts & def'ts in error. Writ of error. Lodged in the clerk's office of the supreme court of the State of California for the within-named defendants in error. Jno. H. Dickinson, William Craig, J. H. Meredith, att'ys for pl'ffs in error.

21 *Assignment of Errors.*

In the Supreme Court of the United States.

LIZZIE BUXTON *et al.*, Pl'ffs in Error,
vs.
HATTIE TRAVERS *et al.*, Defendants in Error.

The plaintiff- in error assigns as error that the final decision and judgment of the supreme court of California holds and declares that section 2269 of the United States Revised Statutes applies only to cases where the pre-emptor had entered the land in the proper land office before dying.

JNO. H. DICKINSON,
WILLIAM CRAIG,
J. H. MEREDITH,
Attorneys for Pl'ffs in Error.

22 In the Supreme Court of the United States.

LIZZIE BUXTON *et al.* Pl'ffs and Pl'ffs in Error,
vs.
HATTIE L. TRAVERS *et al.*, Def'ts and Def'ts in Error. } No. 9809.

Service of writ of error, dated Aug. 4th, 1885, and citation, dated Aug. 4th, 1885, in the above-entitled action admitted this 1st day of September, 1885, and receipt of copies of said writ of error and citation acknowledged.

CURTIS & OTIS,
Attorneys for Def'ts and Def'ts in Error.

23 *Clerk's Certificate.*

In the Superior Court of the State of California.

LIZZIE BUXTON *et al.*, Plaintiff- in Error,

vs.

HATTIE TRAVERS *et al.*, Defendants in Error.

I, J. W. McCarthy, clerk of the supreme court of the State of California, do hereby certify that the foregoing nineteen pages, numbered from one to nineteen, inclusive, contain a full, true, and correct transcript of the proceedings in the cause above entitled, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of the said supreme court this 6th day of October, 1885.

[Seal Supreme Court of California.]

J. W. McCARTHY, *Clerk*,
By FRANK MYERS, *Deputy*.

Endorsed on cover: California sup. court. No. 211. Lizzie Buxton and Anna J. Voorhees, plaintiffs in error, *vs.* Hattie L. Travers, Margaret Wright, William T. Simms, and Miles Shoemaker. Filed January 2, 1886.

Office Supreme Court, U. S.
FILED,
JAN 17 1889
JAMES H. McKENNEY,
CLERK.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1888.

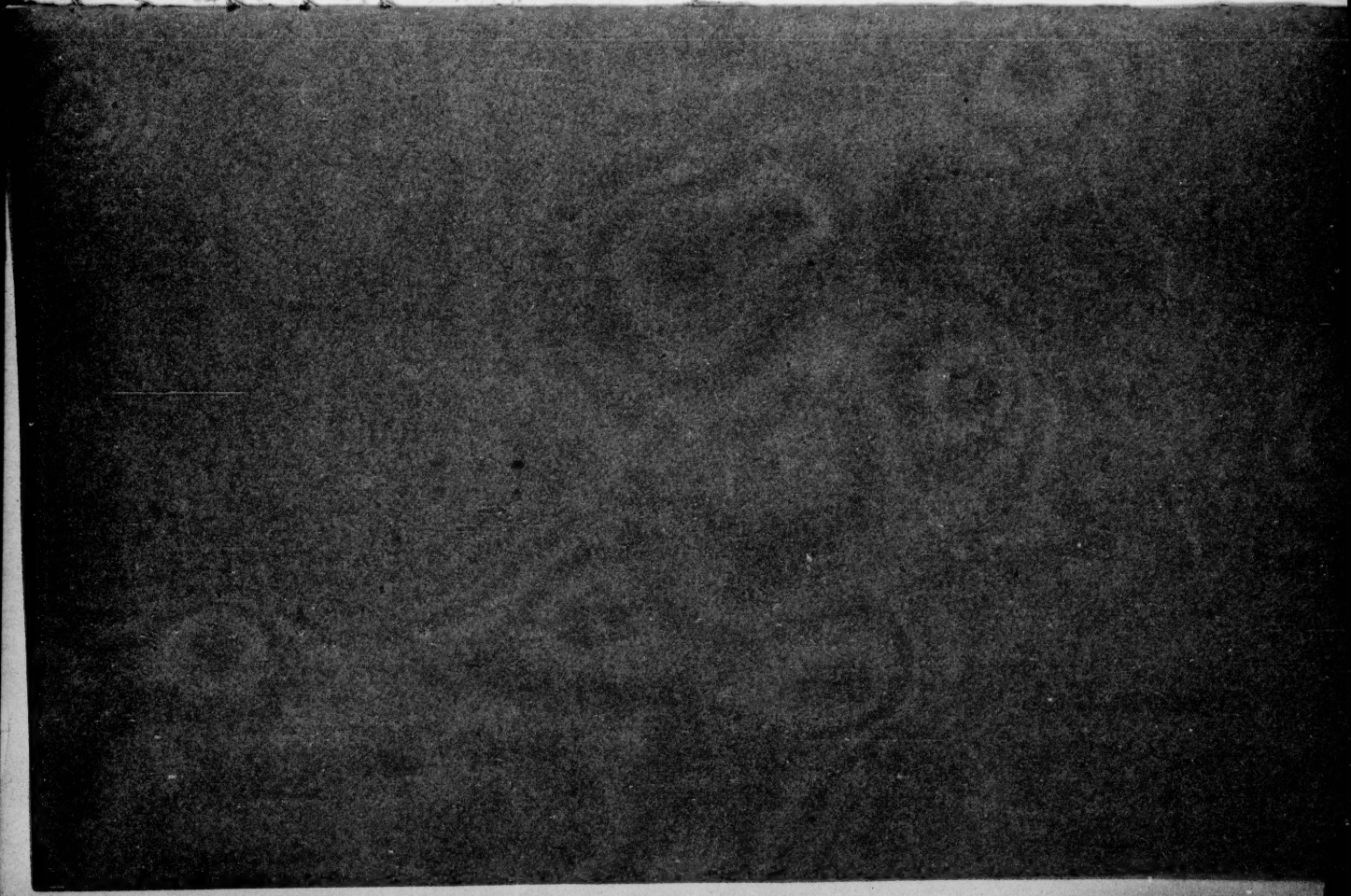
LIZZIE BUXTON AND ANNA L. VORHEES,
PLAINTIFFS IN ERROR,
vs.
HATTIE L. TRAVER, MARGARET WRIGHT, WILLIAM T. SIMMS, AND MILES SHOEMAKER,
DEFENDANTS IN ERROR.

No. 211.

Brief of Plaintiffs in Error on Motion to Dismiss.

WILLIAM CRAIG.

FRESNO, CAL.
REPUBLICAN PRINTING HOUSE,
1889.



In the Supreme Court of the United States

LIZZIE BUXTON, ET. AL.,
Plaintiffs in Error,
vs.
HATTIE L. TRAVERS, ET. AL.,
Defendants in Error.

Brief of Plaintiffs in Error on Motion to Dismiss.

The case is in a nutshell; it arises upon writ of error to the Supreme Court of California, and all the facts pertinent to the merits of the case and to the motion to dismiss, are stated in the opinion of Mr. Justice McKee in delivering the judgment of the court. They may be more briefly stated as follows:

February 2d, 1870, one Oscar Traver settled on eighty acres of unsurveyed and unoccupied land of the United States, being then and at all times thereafter entitled to the benefit of the pre-emption and homestead laws. He continued to reside upon and cultivate said land until January 2d, 1877, when he died, leaving as his only

heirs-at-law, his wife, Hattie L. Traver (a defendant herein) and two daughters by a former marriage, plaintiffs herein. He had always intended to acquire title to said land as soon as possible, under the pre-emption law of the United States, but it was not until January 1st, 1879, two years after his death, that the approved plat of the township in which the land was situated was filed.

His wife, defendant Hattie L. Traver, has occupied said land continuously since his death. On the 16th of June, 1878, she filed in the proper land office her pre-emption declaratory statement on said land, alleging settlement at the date of her husband's settlement (she, as a married woman, being disqualified to make a settlement of her own). November 6th, 1878, she changed said filing into a homestead entry in due form, and November 10th, 1879, obtained a patent to the land from the United States.

On these facts the plaintiffs claim that under Section 2260 of Revised Statutes, the benefit of this patent enured to them as well to the defendant with like effect, as if they had all been named therein, instead of only the defendant, Travers.

There are some other facts discussed in the

opinion, which the plaintiff claimed to amount to actual fraud on the defendant; but they are not necessary to be considered here, because we are aware that this court will follow the ruling of the court below on this subject, and will ignore the question whether they did or did not constitute actual fraud.

We admit the first proposition stated by defendant in his brief, namely: That the only ground upon which this court can take jurisdiction in this proceeding is under the provision of Section 709, Revised Statutes, which provides that the writ to run to a state court in cases where a right or privilege is claimed under a statute of the United States, and the decision is against that right or privilege.

We also accede to the next proposition of the learned counsel, which is expressed in this language: "This, we submit, includes merely cases where the construction of a United States statute is involved; where a question arises whether, under a given law, a party has or has not certain rights. It does not include questions which involve merely the point of whether a state court has correctly decided facts, which, if decided one way, give a party the right claimed, and if decided another way, deny it to him."

To all this we agree, but when counsel goes on to say: "In the case at bar no construction of a United States statute is involved," we widely differ.

It is true that the opinion and judgment of the court below undertakes to state as a fact that no such settlement was made as would enable the heirs to obtain the benefit of the patent. But it must be remembered that the court does state any facts different from or additional to those above set forth. Now, the court below, in stating that there was actually no such settlement as would give plaintiffs the benefit of the patent, was making a *ruling* and not finding any *fact*. The case below was on complaint and demurrer only; there was no room for finding any *facts* whatever. To show that the court *did construe* the United States statute, construed it *adversely* to those claiming under that statute, and construed it *erroneously*, we refer the court to this language in the opinion.

"At the time of his death Traver was, therefore, a mere occupant of the land, as a portion of the unsurveyed public land of the United States, for the pre-emption of which he had taken no steps required by the pre-emption law. In that position he had a mere privilege

of pre-emption; but such a privilege is not a title, legal or equitable; it is only a proffer to a certain class of persons that they may become purchasers if they will, but without payment or an offer to pay it confers no equity. A right is conferred by it only when the party has accepted the offer by claiming the benefit of the statute in the proper manner and within the required time or by payment. (Grand Gulf R. R. Co. vs. Bryan, 8 S. & M., 268; Hutton vs. Frisbee, 37 Cal., 475; Frisbee vs. Whitney, 9 Wall., 187; the Yo Semite Valley case, 15 id., 77.) Until there is an offer to do what the pre emption laws require to be done to initiate and prosecute a pre-emption right there is no existing claim of the settler to pre-empt which can be completed after his death by his heirs or his administrator, and as no such claim was initiated and prosecuted by him in his lifetime he acquired no proprietary interest in the land which upon his death would descend to his heirs and clothe them with an equitable right to control the patent to the land subsequently issued by the United States upon an entry made by another."

As, therefore, the original settler died without making any claim to the benefits of the pre-emption laws which could be perfected by

his heirs, and as no equitable right in the land descended to the heirs, the patent issued to the defendant, Hattie, upon her entry under the homestead laws is not subject to a trust in favor of the plaintiffs (Jarvis vs. Hoffman, 43 Cal., 314), and the court did not err in sustaining the demurrer and entering judgment for defendants. Judgment affirmed."

It will be seen from this that the lower court was of the opinion that the section in question had no application to those pre-emptors who died before *entering* the land; now, this is a misconstruction of the meaning of the section; it is a misunderstanding of the language. The section, so far from contemplating cases where the decedent had made entry in his lifetime, is limited to cases where he dies *before* entry.

It is manifest from the language unmistakably shown by the citation of and reliance upon the leading case of Frisbie vs. Whitney, 9 Wall., 187, that the court was contemplating only those cases where a settler had acquired rights binding upon the United States; and thus the whole tenor of the decision proceeds upon the *construction* that the section of the statute in question was limited in its operation to those cases where the settler had gone so far "by payment or offer to pay," as to raise an

equitable right binding upon the United States. For the purpose of meeting this motion it is enough to show that the court below was proceeding upon a construction of the statute, but as we desire to submit the case upon its merits also, in due time upon this brief, we will add that the construction which the state court gave to this law governing the disposal of the public lands is wrong. We admit that no rights had arisen binding upon the United States. We merely claim to be recipients of her bounty. We are well aware that congress could have repealed the statute before "payment or offer to pay." But it was not repealed and to limit its operation to a state of facts which would have divested a repeal of any effect upon the case, by necessary consequence renders the statute itself wholly inoperative. This we respectfully submit was erroneous.

If the construction of the statute which this language involves should receive the final sanction of this court, it would result that the statute would not only be contradicted by the construction, but it would be allowed no effect whatever. Because, if the pre-emptor had made his entry before he died, and nothing remained but the issuance of the patent, then under settled rules, the patent would enure to

the heirs without the aid of this statute.

If we correctly understand the argument of counsel, it is that the decision below might have been upheld on other grounds than the misconstruction of the statute. To this we say that a fair reading of the opinion will show that it is wholly based on this erroneous view of the law. But be it otherwise, it is the settled law in California touching the meaning of the judgments of her Supreme Court, that if the judgment is made to rest upon alternate grounds, upon either one of two propositions, it is to be considered as resting upon both. "By such reasoning, a case which distinctly determines *two* questions would become an authoritative determination of *neither*." (Camron vs. Kenfield, 57 Cal. 554.) That is to say, if the State Court in the case at bar attempted to or purported to base its decision upon some other proposion, *and also* upon a certain construction of a United States law, it is the determined rule in that state that in construing the decision it may be considered to rest on the question of the statutory construction alone. But we submit that by no stretch of language can the decision be deemed to have rested on anything except the erroneoue construction of a United States law.

That Court in considering an argument to the contrary, said

Respectfully submitted,

WILLIAM CRAIG,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

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PLAINTIFFS IN ERROR,

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DEFENDANTS IN ERROR.

No. 211.

BRIEF FOR PLAINTIFFS IN ERROR,

With Points on Motion to Dismiss.

WILLIAM CRAIG,
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WASHINGTON, D. C.
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If we correctly understand the argument of counsel, it is that the decision below might have been upheld on other grounds than the misconstruction of the statute. To this we say that a fair reading of the opinion will show that it is wholly based on this erroneous view of the law. But be it otherwise, it is the settled law in California touching the meaning of the judgments of her Supreme Court, that if the judgment is made to rest upon alternate grounds, upon either one of two propositions, it is to be considered as resting upon both. "By such reasoning, a case which distinctly determines *two* questions would become an authoritative determination of *neither*." (Camron vs. Kenfield, 57 Cal. 554.) That is to say, if the State Court in the case at bar attempted to or purported to base its decision upon some other proposion, *and also* upon a certain construction of a United States law, it is the determined rule in that state that in construing the decision it may be considered to rest on the question of the statutory construction alone. But we submit that by no stretch of language can the decision be deemed to have rested on anything except the erroneous construction of a United States law.

Respectfully submitted,

WILLIAM CRAIG,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

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1889.

In the Supreme Court of the United States.

LIZZIE BUXTON ET AL.,
PLAINTIFFS IN ERROR,

v.

HATTIE L. TRAVER ET AL.,
DEFENDANTS IN ERROR.

Brief of Plaintiffs in Error, with Points on Motion to Dismiss.

STATEMENT OF THE CASE.

The case is in a nutshell; it arises upon writ of error to the supreme court of California, and all the facts pertinent to the merits of the case and to the motion to dismiss are stated in the opinion of Mr. Justice McKee in delivering the judgment of the court. They may be more briefly stated as follows:

February 2, 1870, one Oscar Traver settled on eighty acres of unsurveyed and unoccupied land of the United States, being then and at all times thereafter entitled to the benefit of the pre-emption and homestead laws. He continued to reside upon and cultivate said land until January 2, 1877, when he died, leaving as his only heirs at law, his wife, Hattie L. Traver (a defendant herein), and two daughters by a former marriage, plaintiffs herein. He had always intended to acquire title to said land as soon as possible under the pre-emption law of the United States, but it was not until

January 1, 1879, two years after his death, that the approved plat of the township in which the land was situated was filed.

His wife, defendant Hattie L. Traver, has occupied said land continuously since his death. On the 16th of June, 1878, she filed in the proper land office her pre-emption declaratory statement on said land, alleging settlement at the date of her husband's settlement (she, as a married woman, being disqualified to make a settlement of her own). November 6, 1878, she changed said filing into a homestead entry in due form, and November 10, 1879, obtained a patent to the land from the United States.

On these facts the plaintiffs claim that under section 2269 of Revised Statutes the benefit of this patent enured to them as well to the defendant, with like effect as if they had all been named therein, instead of only the defendant, Traver.

There are some other facts discussed in the opinion, which the plaintiff claimed to amount to actual fraud on the part of the defendant; but they are not necessary to be considered here, because we are aware that this Court will follow the ruling of the court below on this subject, and will ignore the question whether they did or did not constitute actual fraud.

Assignment of Error.

"The plaintiff in error assigns as error that the final decision and judgment of the supreme court of California holds and declares that section 2269 of the United States Revised Statutes applies only to cases where the pre-emptor had entered the land in the proper land office before dying."

Transcript, 21.

We admit the first proposition stated by defendant in his brief on the motion to dismiss, namely: That the only ground upon which this Court can take jurisdiction in this proceeding is under the provision of section 709, Revised Statutes, which provides that the writ to run to a State court in cases where a right or privilege is claimed under a statute of the

United States, and the decision is against that right or privilege.

We also accede to the next proposition of the learned counsel, which is expressed in this language:

"This, we submit, includes merely cases where the construction of a United States statute is involved; where a question arises whether, under a given law, a party has or has not certain rights. It does not include questions which involve merely the point of whether a State court has correctly decided facts, which, if decided one way, give a party the right claimed, and if decided another way, deny it to him."

To all this we agree; but when counsel goes on to say, "In the case at bar no construction of a United States statute is involved," we widely differ.

It is true that the opinion and judgment of the court below undertakes to state as a fact that no such settlement was made as would enable the heirs to obtain the benefit of the patent. But it must be remembered that the Court does not state any facts different from or additional to those above set forth. Now, the court below, in stating that there was actually no such settlement as would give plaintiffs the benefit of the patent, was making a *ruling* and not finding any *fact*. The case below was on complaint and demurrer only; there was no room for finding any *facts* whatever. To show that the Court *did construe* the United States statute, construed it *adversely* to those claiming under that statute, and construed it *erroneously*, we refer the Court to this language in the opinion:

"At the time of his death Traver was, therefore, a mere occupant of the land, as a portion of the unsurveyed public land of the United States, for the pre-emption of which he had taken no steps required by the pre-emption law. In that position he had a mere privilege of pre-emption; but such a privilege is not a title, legal or equitable; it is only a proffer to a certain class of persons that they may become

purchasers if they will, but without payment or an offer to pay it confers no equity. A right is conferred by it only when the party has accepted the offer by claiming the benefit of the statute in the proper manner and within the required time or by payment. (Grand Gulf R.R. Co. *v.* Bryan, 8 S. & M., 268; Hutton *v.* Frisbee, 37 Cal., 475; Frisbee *v.* Whitney, 9 Wall., 187; the Yosemite Valley Case, 15 *id.*, 77.) Until there is an offer to do what the pre-emption laws require to be done to initiate and prosecute a pre-emption right, there is no existing claim of the settler to pre-empt which can be completed after his death by his heirs or his administrator, and as no such claim was initiated and prosecuted by him in his lifetime he acquired no proprietary interest in the land which upon his death would descend to his heirs and clothe them with an equitable right to control the patent to the land subsequently issued by the United States upon an entry made by another.

"As, therefore, the original settler died without making any claim to the benefits of the pre-emption laws which could be perfected by his heirs, and as no equitable right in the land descended to the heirs, the patent issued to the defendant, Hattie, upon her entry under the homestead laws, is not subject to a trust in favor of the plaintiffs (Jarvis *v.* Hoffman, 43 Cal., 314), and the court did not err in sustaining the demurrer and entering judgment for defendants. Judgment affirmed."

It will be seen from this that the lower court was of the opinion that the section in question had no application to those pre-emptors who died before *entering* the land; now, this is a misconstruction of the meaning of the section; it is a misunderstanding of the language. The section, so far from contemplating cases where the decedent had made entry in his lifetime, is limited to cases where he dies *before* entry.

It is manifest from the language unmistakably shown by the citation of and reliance upon the leading case of Frisbee *v.* Whitney, 9 Wall., 187, that the court was contemplating only those cases where a settler had acquired rights binding upon the United States; and thus the whole tenor of the

decision proceeds upon the *construction* that the section of the statute in question was limited in its operation to those cases where the settler had gone so far, "by payment or offer to pay," as to raise an equitable right binding upon the United States. For the purpose of meeting the motion to dismiss it is enough to show that the court below was proceeding upon a construction of the statute, but as we desire to submit the case upon its merits also, upon this brief, we will add that the construction which the State court gave to this law governing the disposal of the public lands is wrong. We admit that no rights had arisen binding upon the United States. We merely claim to be recipients of her bounty. We are well aware that Congress could have repealed the statute before "payment or offer to pay." But it was not repealed, and to limit its operation to a state of facts which would have divested a repeal of any effect upon the case, by necessary consequence renders the statute itself wholly inoperative. This we respectfully submit was erroneous.

If the construction of the statute which this language involves should receive the final sanction of this Court, it would result that the statute would not only be contradicted by the construction, but it would be allowed no effect whatever. Because, if the pre-emptor had made his entry before he died, and nothing remained but the issuance of the patent, then, under settled rules, the patent would enure to the heirs without the aid of this statute.

If we correctly understand the argument of counsel, it is that the decision below might have been upheld on other grounds than the misconstruction of the statute. To this we say that a fair reading of the opinion will show that it is wholly based on this erroneous view of the law. But be it otherwise, it is the settled law in California touching the meaning of the judgments of her supreme court, that if the judgment is made to rest upon alternate grounds, upon either one of two propositions, it is to be considered as resting upon both.

That court, in considering an argument to the contrary, said :

"By such reasoning, a case which distinctly determines *two* questions would become an authoritative determination of *neither*."

Camron *v.* Kenfield, 57 Cal., 554.

That is to say, if the State court in the case at bar attempted to or purported to base its decision upon some other proposition, *and also* upon a certain construction of a United States law, it is the determined rule in that State that in construing the decision it may be considered to rest on the question of the statutory construction alone. But we submit that by no stretch of language can the decision be deemed to have rested on anything except the erroneous construction of a United States law.

Respectfully submitted.

WILLIAM CRAIG,
Attorney for Plaintiff in Error.

DOUGLAS DYRENFORTH,
of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1888.

LIZZIE BUXTON AND ANNA L. VORHEES,
PLAINTIFFS IN ERROR,
vs.
HATTIE L. TRAVER, MARGARET WRIGHT, WILLIAM T. SIMMS, AND MILES SHOEMAKER,
DEFENDANTS IN ERROR.
} *No.* 211.

Motion of Defendants in Error to Dismiss Writ for Want of Jurisdiction. Notice of Motion. Brief and Argument.

A. L. RHODES,
A. T. BRITTON,
A. B. BROWNE.

WASHINGTON, D. C.
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Respectfully submitted.

WILLIAM CRAIG,
Attorney for Plaintiff in Error.

DOUGLAS DYRENFORTH,
of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1888.

LIZZIE BUXTON AND ANNA L. VORHEES,
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OCTOBER TERM, 1888.

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v.

HATTIE L. TRAVER, MARGARET WRIGHT, WILLIAM T. SIMMS, AND MILES SHOEMAKER,
DEFENDANTS IN ERROR.

No. 211.

To William Craig, Esq., attorney for Plaintiffs in Error, and to said Plaintiffs in Error.

Please take notice that on Monday, the 7th day of January, 1889, at the court-room of the Supreme Court of the United States, in the city of Washington, District of Columbia, on the coming in of the Court on that day, or as soon thereafter as counsel may be heard, defendants in error above named will move said Court by their counsel to order the dismissal of the writ of error in the proceeding above entitled, on the ground that said Court has no jurisdiction of said writ, and particularly in this; that none of the matters enumerated in section 709 of the Re-

vised Statutes of the United States are drawn in question, or in any way involved in the final judgment, decree, or decision in the said suit entitled as above, and in which defendants in error are defendants.

Said motion will be made upon all the papers and records in said cause.

A. L. RHODES,
A. T. BRITTON,
A. B. BROWNE,
Attorneys for Defendants in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

LIZZIE BUXTON and ANNA J. VOORHEES,
Plaintiffs in Error,
v.
HATTIE L. TRAVER, MARGARET WRIGHT, WILLIAM T. SIMMS, and MILES SHOEMAKER, Defendants in Error.

And now come the above-named defendants in error, by their counsel, and move the Court to order the dismissal of the writ of error in the above-entitled cause on the ground that this Court has no jurisdiction of said writ, and particularly in this: That none of the matters enumerated in section 709 of the Revised Statutes of the United States are drawn in question or in any way involved in the final judgment, decree, or decision in said cause entitled as above, and in which defendants in error are defendants.

A. L. RHODES,
A. T. BRITTON,
A. B. BROWNE,
Attorneys for Defendants in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

LIZZIE BUXTON and ANNA L. VORHEES,
Plaintiffs in Error,
v.
HATTIE L. TRAVER, MARGARET WRIGHT, WILLIAM T. SIMMS, and MILES SHOEMAKER, Defendants in Error.

Brief and argument on motion of defendants in error to dismiss writ for want of jurisdiction:

STATEMENT OF FACTS.

The complaint in the original action was demurred to generally. Demurrer was sustained. Judgment for defendants, and on appeal by plaintiff judgment was affirmed by the Supreme Court of the State. The facts appearing in the complaint are substantially as follows: February 2, 1870, one Oscar Traver settled on eighty acres of unimproved land of the United States, being then and at all times thereafter entitled to the benefit of the pre-emption and homestead laws. He continued to reside upon and cultivate said land until January 2, 1877, when he died, leaving as his only heir-at-law his wife, Hattie L. Traver (a defendant herein), and two daughters by a former marriage, plaintiffs herein. He had always intended to acquire title to said land as soon as possible, but it was not until January 1, 1879, two years after his death, that the approved plat of the township in which the land was situated was filed.

His wife, defendant Hattie L. Traver, has occupied said land continuously since his death. On the 16th of June, 1878, she filed in the proper land office her pre-emption declaratory statement on said land. November 6, 1878, she changed said filing into a homestead entry in due form,

and November 10, 1879, obtained a patent to the land from the United States.

Shortly after the death of Oscar Traver, who died intestate, and upon whose estate it is alleged there has never been any administration, said defendant wrote to one of the plaintiffs who lived in San Francisco of their father's death, and that he had left no property. The complaint charged that said representation was made with intent to deceive the plaintiffs, prevent them from filing the necessary papers "to complete the pre-emption and homestead "rights" of their father; that they were deceived thereby and prevented from completing said rights, and that plaintiffs for the first time discovered that said defendant had completed said rights and obtained a patent on December 1, 1882; that during her occupancy said defendant has appropriated the rents, issues, and profits of the land, amounting to $2,500 per annum. The other defendants claim an interest in the land by purchase from defendant, Hattie L. Travers, but that each of them had notice of the foregoing facts and bought without consideration; that defendant, Hattie L. Travers, denies that plaintiffs have any interest in the land or the rents, issues, or profits. The complainant prays for an accounting division of the land, decree that defendants other than Hattie L. Travers have no interest in the land, and for general relief.

I.

As will doubtless be admitted by plaintiffs in error, the only ground on which this Court can take jurisdiction in this proceeding is under the provision of section 709, Revised Statutes, which permits the writ to run to a State court, in cases where a right or privilege is claimed under a statute of the United States, and the decision is against

the right or privilege specially set up or claimed by either party.

This, we submit, includes merely cases where the *construction* of a United States statute is involved; where a question arises whether, under a given law, a party has or has not certain rights. It does not include questions which involve merely the point of whether the State court has correctly decided facts, which if found one way give a party the right claimed, and if decided another, deny it to him. In the case at bar no construction of a United States statute is involved. It is claimed that plaintiffs are the heirs of a deceased party intending to perfect a pre-emption right, the preliminary steps to the consummation of which had been taken by him, and that under the provisions of section 2269, Revised Statutes, upon his death his heirs, or any one of them, can file the necessary papers to complete the same, and that the entry in such case shall be made in favor of the heirs of the deceased pre-emptor, and that a patent issued thereon shall cause the title to inure to such heirs equally as if their names had been specially mentioned.

The State court decides that the plaintiffs own statement of facts in the case does not show or allege that the plaintiffs ancestor was a pre-emptor; does not show or allege that he had any intention to pre-empt; does not show or allege that the necessary papers were ever filed, or attempted to be filed, to complete the pre-emption. In other words, the State court has not decided against the right or privilege of plaintiffs under the statute in question in any case where the facts bring them within its purview, but it decides merely that the facts as alleged by plaintiffs show no case for the application of the statute. It certainly could not be contended that a writ of error would lie to this Court in a case where, for instance, the foregoing

statute was involved, and it clearly appeared by the decision of the State court that the claimant under it *was not an heir* of the alleged pre-emptor. The statute only extends its benefit to heirs, and it would be seen at once that the claimant did not bring himself within its application, and yet, we submit, that would be as much the denial of a right under a United States statute as what is claimed to be such in the case at bar.

II.

In cases of this general character, this Court has always held it essential to the exercise of its jurisdiction under writs of error to a State court that the record should show a complete title under the act of Congress in question, and that the judgment of the State court is in violation of that act.

Hickie *v.* Starke, 1 Pet., 94.

A reference to the record in the case at bar shows neither a complete nor any title under the act of Congress referred to on the part of plaintiffs in error, nor that the judgment of the State court was in violation of that act.

III.

If the decision made by the State court upon the face of the record is entirely consistent with the construction of the statute contended for by the party appellant, no case is made out for the appellate jurisdiction of this Court.

Ocean Ins. Co. *v.* Pulleys, 13 Pet., 157.

Udell *v.* Davidson, 7 How., 769.

IV.

Where the Court perceives from the record that the allegations of the complaint in the original action are insufficient to support any claim for the judgment prayed for, jurisdiction will not be assumed by this Court.

Com. Bank *v.* Rochester, 16 Wall., 639.

V.

In conclusion, we submit generally that this Court has no jurisdiction to re-examine the judgment of a State court where a Federal question was not, in fact, passed upon, and where a decision of it was rendered unnecessary in the view which the court below took of the case.

McManus *v.* O'Sullivan, 1 Otto, 578.

Balling *v.* Lerrues, *Ibid*, p. 594.

Respectfully submitted.

A. L. RHODES,
A. T. BRITTON,
A. B. BROWNE,
Attorneys for Defendants in Error.

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Respectfully submitted.

A. L. RHODES,
A. T. BRITTON,
A. B. BROWNE,
Attorneys for Defendants in Error.

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Supreme Court of the United States.

LIZZIE BUXTON AND ANNA L. VOORHEES,
PLAINTIFFS IN ERROR,

vs.

HATTIE L. TRAVER, MARGARET WRIGHT, WILLIAM T. SIMMS, AND MILES SHOEMAKER,
DEFENDANTS IN ERROR.

No. 211.

Brief and Argument of Defendants in Error.

A. L. RHODES,
W. J. CURTIS,
Attorneys for Defendants in Error.

SAN BERNARDINO, CAL.
L. M. HOLT PUBLISHING CO. STEAM PRINT.
1889.

IN THE

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DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

The complaint was demurred to generally, demurrer sustained, judgment for defendants, plaintiff appealed to the Supreme Court of the State of California, judgment affirmed, (Transcript of Record, Folios 12 to 15 inclusive,) and plaintiffs by writ of error bring the case to this Court. The

facts appearing in the complaint are substantially as follows:

February 2, 1870, one Oscar Traver settled on 80 acres of unimproved land of the United States, being then and at all time thereafter entitled to the benefit of the Pre-emption and Homestead laws. He continued to reside upon and cultivate said land until January 2, 1877, when he died, leaving as his only heirs at law, his wife, Hattie L. Traver (a defendant herein, whom he married in December, 1870), and two daughters by a former marriage, plaintiffs herein. He had always intended to acquire title to said land as soon as possible, but it was not until July 1, 1879, two years and a half after his death, that the approved plat of the township in which the land was situated was filed. His wife, defendant Hattie L. Traver, has occupied said land continuously since his death. On the 16th of July, 1869, said defendant filed in the proper land office her pre-emption declaratory statement on said land. November 6, 1878, she changed said filing into a Homestead Entry in due form, and November 10, 1879, obtained a patent for the land from the United States.

Shortly after the death of Oscar Traver, who died intestate and upon whose estate it is alleged there has never been any administration, said defendant wrote to one of the plaintiffs, who lived in San Francisco, of their father's death, and that he had left no property. The complaint charges that said representation was made with intent to deceive the

plaintiffs, prevent them from filing the necessary papers "to complete the pre-emption and homestead rights" of their father, that they were deceived thereby and prevented from completing said rights, and that plaintiffs for the first time discovered that said defendant had completed said rights and obtained a patent on December 1, 1882. That during her occupancy said defendant has appropriated the rents, issues and profits of the land, amounting to $2500 per annum. That the other defendants claim an interest in the land by purchase from defendant, Hattie L. Traver, but that they each of them had notice of the foregoing facts, and bought without consideration. That defendant, Hattie L. Traver, denies that plaintiffs have any interest in the land or the rents, issues and profits. The complaint prays for an accounting, division of the land, decree that defendants, other than Hattie L. Traver, have no interest in the land, and for general relief.

Respondents' Brief and Argument.

I.

The reasoning and citations in the opinion of the Supreme Court of the State of California, in this proceeding (Transcript, pages 6, 7 and 8) are in themselves a stronger support for the conclusions in said opinion arrived at than anything which can be advanced by these respondents, and in addition to the points and authorities set forth in said opin-

ion, respondents consider it only necessary to suggest the following propositions:

II.

The foundation of the claim of plaintiffs in error is that they were entitled to pre-empt the land, and but for the alleged fraud, practiced upon them by the respondent (Hattie L. Traver), they would have obtained the patent themselves.

This theory as applied to the facts of this case is not even plausible for the following reasons:

Before a person will be permitted to call in question the proceedings through which another has obtained a patent for public lands, *he must show in himself all the conditions necessary to entitle him to pre-empt.*

Burrell vs. Haw, 40 Cal., 377.
Page vs. Hobbs, 27 Cal., 483.
People vs. Jackson, 24 Cal., 630.
Megerle vs. Ashe, 33 Cal., 74.

III.

Plaintiffs in error do not allege in themselves all, nor any of the conditions (for the purposes of this case) necessary to entitle to them to pre-empt.

It does not appear from the complaint that Oscar Traver ever settled upon the land in controversy *intending to pre-empt it.*

The complaint says merely, "He intended to acquire title thereto from the United States as soon as he possibly could."

This intention may as well be construed to have been in regard to a homestead as a pre-emption.

That the *intention* of the party settling is an essential feature in acquiring title is apparent from the whole Pre-emption Act, and particularly from Sections 2261, 2264, 2266, 2272 and 2275, U. S. Revised Statutes, Ch. IV, Title XXXII.

IV.

The daughters of Oscar Traver (plaintiffs in error herein) after they were notified of their father's death, apparently allowed the two years and a half intervening from that time to the filing of the township plat and the interim between that time and the filing of the declaratory statement of respondent to pass without inquiry or effort on their part to learn any facts regarding their father's occupation of the land in controversy, and without taking any steps whatever to preserve any right they claimed to have had in the premises.

They say, to be sure, that they were misled by the letter of the defendant in error and did not learn the fact that she had obtained a patent until December, 1882, but they failed to state any sufficient reason for having been misled and for their inaction and failure to inquire. It is natural to presume that the daughters knew that their father was in occupation of the land in controversy and had been for many years prior to his death, and it does not appear anywhere in the complaint that

they did not have the fullest knowlege of their father's actual situation and circumstances. *They only say that they did not know that a patent had been granted.* They could not have been misled by the letter of respondent, Hattie L. Traver, for it misrepresented or concealed nothing.

V.

The whole weight of case of plaintiffs in error depends upon an utterly false premise. They proceed upon the theory that Oscar Traver was a pre-emptor, which the facts, stated in the complaint, shows him nowhere to have been, and further upon the mistaken idea that respondent, Hattie L. Traver, as widow of the deceased was obliged to proceed solely under the provisions of section 2269 (U. S. Revised Statutes) to procure title to the land. Plaintiffs in error seem to have forgotten that section 2291 (U. S. Revised Statutes) was equally in force at the time of the said respondent's entry, *that her patent was issued in pursuance of the terms of that section and no other*, and under that section plaintiffs in error were in no way recognized.

Respectfully submitted,

A. L. RHODES,
W. J. CURTIS,
Attorneys for Defendants in Error.

130-238

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1370.

BRIGIDO BOTILLER, F. BOTILLER, T. BOTILLER, A. M. VALDEZ, M. LAMORIE, ET AL., PLAINTIFFS IN ERROR,

vs.

DOMINGA DOMINGUEZ.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED OCTOBER 17, 1888.

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1 *Transcript on Appeal.*

In the Supreme Court of the State of California.

BRIGIDO BOTILLER *et al.*, Appellants,
vs.
DOMINGA DOMINGUEZ, Respondent. } No. 11336.

H. K. S. O'Melveny, attorney for appellants; Howard & Robarts and A. L. Rhodes, attorneys for respondent.

Endorsed: Filed this 11th day of Nov., 1885. J. W. McCarthy, clerk, by John T. Gaffey, deputy clerk.

2 & 3 In the Supreme Court of the State of California.

DOMINGA DOMINGUEZ
vs.
BRIGIDO BOTILLER, TADEO BOTILLER, FELIPE BOTILLER, ANTO. Maria Valdez, Miguel Lamorie, Pedro Sepulveda, Ramon Vejar, Trinidad Higuera, Antonio Tapia, Manuel Feliz, Loreto Robles, Sr., Loreto Robles, Jr., Jose Maria Leon, Bernardino Selayo, Senon Sta. Cruz, Eduardo Stokes, Jose Roberts, Francisco A. Reyes, Manuel Sanchez, Fernando Dominguez, Jose Casimiro Dominguez, Pablo Bojorquez, Enrique Sepulveda, Guadalupe Rocha, Gregorio Tapia, Ramon Tapia, Juan Yrigoyen.

Comes the plaintiff, and, complaining of the defendants and of each of them, avers—

4 That on the 1st day of November, 1883, and for a long time prior to said date the plaintiff was seized in fee and in possession of an undivided one-seventh part of that certain tract of land situated in the county of Los Angeles, State of California, and known as the "Rancho Las Virgenes," granted to Nemesio Dominguez and Domingo Carrillo by Jose Figueroa, political chief, October 1st, 1834, and described as follows: Beginning at a point on the south boundary line of the Rancho Simi, from which a 4 x 4 post marked LV 14 in a stone mound 18 inches high bears east 8.00 chains distant, said point being station No. 14 of the official survey of Las Virgenes rancho, granted to Jose Maria Dominguez by Juan B. Alvarado 6th April, 1837, and running thence S. 3° 07′ W., magnetic variation 14° 30′ east, down the west side of Posita cañon, 158.26 chains to sandstone mound marked LV 13, station; thence S. 49½° W., magnetic variation 14° 25′ east, 128.00 chains to station; thence S. 43° 21′ E. 240 chains to large live-oak tree with cross in a canada adjoining hills; thence north 18° 05′ E. 326.68 chains to a point near road in mouth of cañon; thence S. 86° 18′ E.

5 287.76 chains; thence N. 11° 45′ E. 46.37 chains to cross on a low round hill; thence N. 74° 02′ W. 278.00 chains; thence west 190 chains to the place of beginning.

Second.

That while the plaintiff was so seized and in possession of the hereinbefore-described premises the defendants and each and every of them, on the 1st day of November, 1883, entered into the possession of the demanded premises and ousted the plaintiff, and the said defendants and each of them now unlawfully withhold the possession of said premises from plaintiff, to her damage in the sum $3,000.

Third.

That the value of the rents, issues, and profits of said premises from the said 1st day of November, 1883, and while plaintiff has thus been excluded therefrom by the defendants and by each of them is $1,000.

Wherefore plaintiff prays judgment against the defendants and each and every of them—

1. For the recovery of the possession of the demanded premises.
2. For the sum of $3,000 for the unlawful withholding of the said premises by the defendants.

6 3. For the sum of $1,000, the value of the said rents, issues, and profits and costs of suit.

HOWARD & ROBARTS,
Att'ys for Plaintiff.
A. L. RHODES, *Of Counsel.*

STATE OF CALIFORNIA, }
County of Los Angeles, } *ss:*

Dominga Dominguez, being duly sworn, saith that she is the plaintiff in the foregoing-entitled action; that she has heard read and translated to her the foregoing complaint and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters therein set forth on information and belief, and as to those matters she believes it to be true.

Subscribed and sworn to before me this 11th day of January, 1884.

her
DOMINGA x DOMINGUEZ.
mark.

JOHN ROBRATS,
Notary Public.

Filed January 16, 1884.

A. W. POTTS, *Clerk,*
By H. OWEN, *Deputy.*

7 In this action the defendants, Pedro Sepulveda, Manuel Feliz, Manuel Sanchez, Pablo Bojorquez, Gregorio Tapia, and Ramon Tapia, having been regularly served with process, and having failed to appear and answer the plaintiff's complaint on file herein, and the time allowed by law for answering having expired,

the default of said defendants, Pedro Sepulveda, Manuel Feliz, Manuel Sanchez, Pablo Bojorquez, Gregorio Tapia, and Ramon Tapia, in the premises is hereby duly entered according to law.

Attest my hand and the seal of said court this 6th day of May, A. D. 1885.

C. H. DUNSMOOR, *Clerk*,
By A. N. HAMILTON, *Deputy*.

A summons duly issued in this action to defendants, and was duly served on each of the parties herein, for whom Holton & O'Melveny are attorneys.

(Title of court and cause).

Come now the following-named defendants herein, viz., Brigido Botiller, Tadeo Botiller, Felipe Botiller, Eduardo Stokes,
8 Loreto Robles, Sr., Loreto Robles, Jr., Jose Maria Leon, Antonia Tapia, Fernando Dominguez, Jose Casimero Dominguez, Guadalupe Rocha, Francisco A. Reyes, Miguel Lamorie, Trinidad Higuera, Bernardino Celaya, Ramon Vejar, and Joseph Robinson, sued in this action by the name of Jose Roberts, and, severing from their codefendants, file this their demurrer to the complaint herein, and for ground of their demurrer allege—

That said complaint does not state facts sufficient to constitute a cause of action as against these defendants or either of them.

G. M. HOLTON,
Attorney for Defendants, Brigido Botiller, Tadeo Botiller, Felipe Botiller, Eduardo Stokes, Loreto Robles, Sr., Loreto Robles, Jr.

Received a copy of the within this 28th day of January, A. D. 1884.

HOWARD & ROBARTS AND
A. L. RHODES,
Attorneys for Plaintiff.

Demurrer overruled by the court.

Filed Jan'y 28th, 1884.

A. W. POTTS, *Clerk*.

9 (Title of court and cause.)

To the defendants, B. Botiller, T. Botiller, F. Botiller, E. Stokes, L. Robles, Sr., L. Robles, Jr., J. M. Leon, A. Tapia, F. Dominguez, Jose C. Dominguez, G. Rocha, F. A. Reyes, M. Lamorie, T. Higuera, B. Celaya, R. Vejar, and Joseph Robinson, and their att'y, G. M. Holton, Esq.:

You will please take notice that the court this day overruled your joint demurrer heretofore interposed by you to the plaintiff's complaint and allowed you ten days wherein to answer said complaint.

January 29th, 1884.

HOWARD & ROBARTS,
Att'ys for Plaintiff.
A. L. RHODES, *Of Counsel.*

Rec. copy of within this 29th January, 1884.

G. M. HOLTON,
Att'y for Demurring Defendants.

Filed January 29th, 1884.

A. W. POTTS, *Clerk*,
By A. RIMPAU, *Deputy*.

10 *Answer of Defendants.*

(Title of court and cause.)

Come now the defendants, Brigido Botiller, Tadeo Botiller, Felipe Botiller, Eduardo Stokes, Loreto Robles, Sr., Loreto Robles, Jr., Jose Maria Leon, Antonia Tapia, Fernando Dominguez, Jose Casimero Dominguez, Guadalupe Rocha, Francisco A. Reyes, Miguil Lamory, Trinidad Higuera, Bernardino Celaya, Ramon Vejar, Antonia Maria Valdez, and Joseph Robinson, and, severing from their codefendants, file this their answer to the complaint herein, and allege as follows, to wit:

I.

They admit that they are severally in possesion of the following-described parcels of land, to wit: Brigido Botiller, of the N. ½ of the S. E. ¼ and the W. ½ of the N. E. ¼ of section 1, T. 1 S., R. 18 W., S. B. M., containing 160 acres; Tadeo Botiller, of the W ½ of the S. W. ¼ and the S. W. ¼ of the N. W. ¼ of section 30, T. 1 N., R. 17 W., and the S. E. ¼ of the N. E. ¼ of section 26, T. 1 N., R. 18 W., S. B. M., containing 160 acres; Felipe Botiller, of the W. ½ of the
11 S. E. ¼ and the E. ½ of the S. W. ¼ of section 30, T. 1 N., R. 17 W., S. B. M., containing 160 acres; Eduardo Stokes, of the S. ½ of the S. W. ¼ and the S. W. ¼ of the S. E. ¼ of section 6 and the N. W. ¼ of the N. E. ¼ of section 7, T. 1 S., R. 17 W., S. B. M., containing 160 acres; Jose Maria Leon, of the N. ½ of the S. E. ¼ and the S. E. ¼ of the S. E. ¼ of section 12, T. 1 S., R. 18 W., S. B. M., and the N. W. ¼ of the S. W. ¼ of section 7. T. 1 S., R. 17 W., S. B. M., containing 160 acres; Antonia Tapia, of the N. ½ of the N. E. ¼ and the S. W. ¼ of the N. E. ¼ and the N. E. ¼ of the N. W. ¼ of section 18, T. 1 S., R 17 W., S. B. M., containing 160 acres; Fernando Dominguez, of the E. ½ of the N. E. ¼ of section 30 and the S. ½ of the S. E. ¼ of section 19, T. 1 N., R. 17 W., S. B. M., containing 160 acres; Jose Casimiro Dominguez, of the E. ½ of the N. W. ¼ and the W. ½ of the N. E. ¼ of section 30, T. 1 N., R. 17 W., S. B. M., containing 160 acres; Francisco A. Reyes, of the N. E. ¼ of the N. W. ¼ of section 1, T. 1 S., R. 18 W., S. B. M., and the E. ½ of the S. W. ¼ and the N. W. ¼ of the S. W. ¼ of section 36, T. 1 N., R. 18 W., S. B. M., containing 160 acres; Guadalupe Rocha, of the N. ½ of the S. W. ¼ and the S. ½ of the N. W. ¼ of section 20, T. 1 N., R. 17 W., S. B. M., containing 160 acres; Miguil Lamory, of
12 the N. ½ of the S. E. ¼ and the S. ½ of the N. E. ¼ of section 20, T. 1 N., R. 17 W., S. B. M., containing 160 acres; Antonio

Maria Valdez, of the 160 acres at the Calabassas Spring, bounded north by land occupied by Miguel Leonis, on the south and west by land occupied by Vicente Valdez, and on the east by unoccupied Government land; Bernardino Celaya, of 160 acres, bounded on the north by land occupied by E. R. Stokes, on the east by land occupied by Santa Cruz, on the south by land occupied by Jose Maria Leon, and on the west by land occupied by Pedro Sepulveda; Trinidad Higuera, of the N. E. ¼ of the S. W. ¼ and the S. E. ¼ of the S. W. ¼ and the S. E. ¼ of the N. W. ¼ and the S. W. ¼ of the S. E. ¼ of section 12, T. 1 S., R. 18 W., S. B. M., containing 160 acres; Ramon Vejar, of the W. ½ of the N. W. ¼ of section 12, T. 1 S., R. 18 W., S. B. M., containing 80 acres; Loreto Robles, Jr., of the N. ½ of the S. E. ¼ of section 6 and the S. W. ¼ of the N. W. ¼ and the N. W. ¼ of the S. W. ¼ of section 5, in T. 1 S., R. 17 W., S. B. M., containing 160 acres; Joseph Robinson, of the S. E. ¼ of the N. W. ¼ of the S. W. ¼ and the N. ½ of the S. E. ¼ of section 5, in T. 1 S., R. 17 W., S. B. M., containing 160 acres; Loreto Robles, Sr., of the N. ½ of
13 S. W. ¼ and the S. E. ¼ of the N. W. ¼ and the S. W. ¼ of the N. E. ¼ of section 17, T. 1 S., R. 17 W., S. B. M., containing 160 acres; but deny that they or either of them are in possession of any other portion of the premises described in the complaint herein.

II.

These defendants and each of them deny that the plaintiff is owner in fee or entitled to the possession of or was the owner of or was possessed of an undivided seventh part of said land or of any part thereof.

III.

They allege, upon information and belief, that the said land is public land of the United States; that the same is not yet surveyed by the Government, but that the descriptions of the several tracts claimed and occupied by these respective defendants, upon a survey being made by said Government, would be as the same is herein described, and that said tracts are embraced in the boundaries described in plaintiff's complaint.

IV.

These defendants allege that said land occupied by them
14 and herein described is agricultural land; that they and each of them are citizens of the United States, over the age of twenty-one years, and occupy severally the tracts of land herein described, and have improved and cultivated the same and are in possession thereof with good faith, with the intention of holding the same as pre-emption or homestead settlers upon said land.

V.

They deny that they or either of them, on the 1st day of November, 1883, or ever, ousted the plaintiff or any other person from the

possession of said premises or from any portion thereof or from any interest therein, or that they or either of them unlawfully withhold the possession of said premises from the plaintiff, to her damage in the sum of $3,000 or any other sum, or at all.

VI.

They deny that the plaintiff is the owner of an undivided one-seventh part of the premises herein described or of any part thereof or interest therein, or ever was or that she is entitled to the possession of said premises or of any portion thereof or interest therein.

15 VII.

They deny that the value of the rents, issues, and profits of said premises from 1st day of November, 1883, is the sum of $3,000 or any sum whatever.

G. M. HOLTON AND
H. K. S. O'MELVENY,
Attorneys for the Defendants Herein Named.

STATE OF CALIFORNIA, }
County of Los Angeles, } *ss:*

Jose Casimero Dominguez, being duly sworn, says he is one of the defendants herein; that he has heard the foregoing answer read and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

his
JOSE CASIMERO x DOMINGUEZ.
mark,

Sworn to before me and subscribed in my presence this 20th day of March, A. D. 1884.

A. W. POTTS, *Clerk.*

16 Received a copy of the within this 20th day of March, 1884.

HOWARD & ROBARTS,
Att'ys for Plaintiff.
A. L. RHODES, *Of Counsel.*

Filed March 20th, 1884.

A. W. POTTS, *Clerk.*

Verdict.

(Title of court and cause).

In the above-entitled action we, the jury, find for the plaintiff.
May 6th, 1885.

JOHN P. MORAN, *Foreman.*

17 *Judgment on Verdict in Open Court the Sixth Day of May*, 1885.

In the Superior Court of the State of California in and for the County of Los Angeles.

DOMINGA DOMINGUEZ, Plaintiff,

vs.

BRIGIDO BOTILLER, *et als.*, Defendants.

This action came on regularly for trial. The said parties appeared by their attorneys, Howard & Robarts, counsel for plaintiff, and H. K. S. O'Melveny and Geo. M. Holton, Esq., for defendants. A jury of twelve persons was regularly empaneled and sworn to try said action. Witnesses on the part of plaintiff and defendants were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, and, being called answered, to their names and say:

18 "In the Superior Court of Los Angeles County, State of California.

"DOMINGA DOMINGUEZ *vs.* B. BOTILLER *et als.*

"In the above-entitled action we, the jury, find for the plaintiff.
"May 6, 1885.

"JOHN P. MORAN, *Foreman.*"

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that said plaintiff, Dominga Dominguez, do have and recover from said defendants, Brigido Botiller, Tadeo Botiller, Felipe Botiller, Antonio Maria Valdey, Miguel Lamorie, Ramon Vejar, Trinadad Higuera, Antonio Tapia, Loreto Robles, Sr., Loreto Robles, Jr., Jose Maria Leon, Bernardino Selayo, Eduardo Stokes, Joseph Robinson, Francisco A. Reyes, Fernando Dominguez, Jose Casimiro Dominguez,
19 Guadalupe Rocha, and from each of them the possession of the followng-described lands, situate in the county of Los Angeles, State of California, and known as the Rancho "Las Virgenes," granted to Nemesio Dominguez and Domingo Carrilo by Jose Figueroa, political chief, October 1st, 1834, and described as follows: Beginning at a point on the south boundary line of the Rancho "Simi," from which a 4 x 4 post, marked LV 14, in a stone mound 18 inches high, bears east, 8.00 chains distant, said point being station No. 14 of the official survey of Las Vergenes rancho, granted to Jose Maria Dominguez by Jaun B. Alvarado, 6th April, 1837, and running thence S. 30° 0′ W., magnetic variation 14° 30′ E., down the west side of the Posita cañon 158.26 chains to sandstone in stone mound marked LV. 13, station; thence S. 19½° W., magnetic variation 14° 25′ E., 128.00 chains to station; thence S. 43° 21′ E. 240 chains to large live-oak tree with cross in a canada adjoining the hills; thence

north 18° 05′ E. 326.68 chains to a point near road in mouth of cañon; thence S. 86° 18′ E. 26.6 chains; thence N. 11° 45′ E. 46.3 chains to cross on a low round hill; thence N. 4° 02′ W. 278.00 chains; thence west 190 chains to the place of beginning; and have and recover of and from said defendants the sum of $170.55 costs and disbursements incurred in this action.

20 Judgment recorded the 7th day of May, A. D. 1885, Book 6, page 201, *et seq.*
Filed May 7th, 1885.

C. H. DUNSMOOR, *Clerk*,
By L. J. THOMPSON, *Deputy.*

In the Superior Court, County of Los Angeles, State of California.

DOMINGA DOMINGUEZ, Plaintiff,
vs.
BRIGIDO BOTILLER *et als.*, Def'ts. } No. 2915.

This cause came on to be heard the 5th day of May, 1885, before the Hon. A. Brunson, judge, and a jury, Howard & Robarts appearing for the plaintiff and H. K. S. O'Melveny and G. M. Holton for the defendants. Being ready for trial, Mr. Robarts, in the opening statement of plaintiff's case to the jury, stated to them that this was a Mexican grant; that it had not been presented for confirmation before the board of land commissioners under the act of
21 March 3rd, 1851; whereupon counsel for defendant moved the court for a nonsuit on the ground that all Mexican claims or titles under said act of Congress which were not presented to said board should be deemed held and taken to be public land of the United States; which motion for nonsuit was denied, and the defendant duly accepted.

Plaintiff's counsel next offered to read in evidence an exemplified copy from the archives of the office of the surveyor general for the State of California of the expediente of the grant of the Rancho Las Virgines to Domingo Carillo and Nemesio Dominguez, duly certified; also accompanying it with the exemplified and certified copy of the act of juridical possession of said grant, duly certified by the surveyor general of U. S., which were marked, respectively, Plaintiff's Exhibits "A" and "B."

Also offered in connection therewith a translation thereof made by R. C. Hopkins, keeper of the archives, marked Plaintiff's Exhibit "C;" to the reading of all which or either of them the defendants, by their counsel, objected—

1st. To the petition of Carillo and Dominguez to Gov. Figueroa for said grant, because it does not conform to the provisions of the act of 1824 or regulations of 1828 of the Mexican law, in
22 this, that no sufficient description is given of the land asked for therein; no boundary, no landmarks or natural objects or courses or distances by which the place called Las Virgines can be known, and is therefore void for uncertainty.

2nd. Because both petition and diseño, when taken together, fail to designate any land with reasonable certainty.

3d. On the ground that the place called Las Virgines, at the date of this alleged grant, it is shown by the expediente, was in the possession of the San Fernando mission fathers, who claimed the prior title, and was, therefore, under the Mexican law, not the subject of grant by a Mexican governor, and that the exercise by Gov. Figueroa of judicial powers to hear and determine the question of title between the mission fathers and the alleged grantees was a usurpation and an unauthorized exercise of power.

4th. Because the alleged instrument of concession or grant on its face was not a definite title, but a mere inchoate or equitable claim at most, for the reason that it is made subject to certain conditions therein specified; among other conditions that before said grant should take effect the said grant should be approved by the supreme government of Mexico, and there is no evidence that it ever was so approved.

23 All of which conditions more fully appear in the expediente, and that there is no evidence here of any character that such conditions were ever complied with.

III.

Counsel for defendants objected to the introduction of the act of juridcal possession on the grounds—

1st. That it appears to have been made prior to any approval either by the departmental assembly or the supreme government.

2nd. Because it disregarded the description in the alleged grant and diseño.

3rd. That the governor exceeded his authority in granting (a quantity) more than was petitioned for; that petitioned for being $1\frac{3}{4}$ of a league by $\frac{3}{4}$ of a league. The expediente and evidence therein proves that the place called Los Virgines was only $1\frac{1}{2}$ leagues in length by $\frac{3}{4}$ of a league in breadth.

4th. Objection is made to the introduction of those documents and to each and every thereof on the ground that the same are and each one is immaterial, irrelevant, and incompetent.

Because the same is a more equitable claim and therefore
24 ought to have been presented to the board of land commissioners, which it is conceded and admitted was never done.

COURT: Objections overruled.

Defendants then and there duly excepted.

Whereupon plaintiff read in evidence to the jury the expediente and documents therein as follows:

25 CIVIL.

Sobre el Terreno Nombrado Las Virgenes, por los Ciudadanos Alferes Domingo Carrillo y Nemecio Dominguez.

MISION DE SAN FRANCO, *Nov.* 14, 1883.

De conformidad con las leyes de la materia, informe el Ayuntamiento del pueblo de Los Angeles si los interezados en esta instancia obtienen los requisitos prevenidos para ser atendidos; si el terreno que pretenden está comprendido en las viente leguas limitrofes ó diez litorales que espresa la ley de 18 de Agosto de 1824, si ha pertenecido ó pertenese á propriedad particular, corporacion, presidio ó pueblo si se reconoce por valdio; si es
26 propio para siembras de regadio, temporal ó solo para abrevadero; con todo lo de mas que sea concerniente à ilustrar lo materia. Ebacuado este informe se pasara el expedite con igual objeto al R. P. Ministro de la Mision de San Fernando quien con su informe lo debolvera á este Gobierno.

FIGUEROA.

Señor Gefe Supr. Politico, Los Ciudadanos Domingo Carrillo Alferez de la compania de Caballeria permanente de Santa Barbara y Nemesio Dominguez vecino del pueblo de Nuestra Señora de Los Angeles; el primero á nombre de cinco hijos menores de su familia, ante V. S. conforme haya lugar en derecho comparecen y esponen; que con el fin de adelantar los intereses de las familias de ambos, cultivando y fomentando del mejor modo un terreno que se halla á las doce leguas al Oeste del pueblo de Nuestra Señora de Los Angeles llamado Las Virgenes del que devidamente acompañamos el adjunto diceño que instruira a S. S. su Localidad y circumstancias. Este terreno en un tiempo fué ocupado por un vecino del dicho pueblo llamado Miguel Ortega y haviendo fallecido este, y un hijo suyo unico heredero, queda abandonado y valdio; está distante de la Mision de San Fernando como cinco leguas á la costa y nuevamente esta Mision ha puesto de su facultad en el paraje un corto numero de ganado lanar sin necesitar de el, para su cria. En tal virtud no será
27 estraño que el Misionero trata de interponer a nuestra peticion derecho alguno por donde impedirnos. Por tanto á la justa deliveracion de V. S. encomendamos esta solicitud para que en su consecuencia se sirva recivir los informes que tenga á bien, repitiendo los expresados un vivo deseo de proporcionar las mejores

ventajas á los interéses de nuestros hijos; estimulandolos al cultivo y prosperidad; y sirviendose recivirnos la presente en papel comun por no haber de ningun sello en este lugar.

Sta. Barbara, 18 de Octubre de 1833.

DOMINGO CARRILLO.
NEMESIO DOMINGUEZ.

(Here insert photograph marked p. 27.)

28 PUEBLO DE LOS ANGLS., 21 *de Nvre. de* 1883.

Este Yltre. Ayuntamiento en junta de Cavildo celebrada el dia 18 del corrte. de conformidad con el decreto qe. antecede del Sór. Gefe Politico, informa que los interesados en la antecedente representacion obtienen los requisitos para ser atendidos y dueños de bienes competentes para cubrir el lugar que solicitan: que dicho paraje se contempla como valdio y que hace el termino de quince años poco mas ó ménos; que subsiste abandonado por uno de los herederos del finado Miguel Ortega, quien fué dueño de él que en algunas partes de los terrenos correspondientes al espresado sitio son propias para siembras de temporal y escasas para las de Regadio; que el reptdo. paraje se alla á distancia como de tres leguas a la orilla del mar y como seis de la Mision de San Fernando. Es cuanto por este Ayuntamiento se le ofrece y hay que informa.

FELIPE LUGO.

VICENTE MORAGA, *Srio.*

29 SAN FERNANDO, *y Novl.*, 22 *de* 1883.

Sor. Genl.—Sobre el informe que se me pide de la pretencion de los ciudadanos arriba espresados sobre los parages de Las Virgenes Agua Amarga y Triunfo puedo decir qe. en el año 17 los tres sitios se hallavan baldios pues aunque Las Virgenes havia sido de un individuo, muerto este, su hijo se le abandonó y lo dejó por lo qe. se deve reputar como valdio. En otro año observando el P. Ministro de esta Mision qe. no podia alimentar y vestir á los Indios por falta de sitio adonde poner los vienes necesarios para este objeto representó dicha necesidad al Sor. Govdor. Dn. Pablo Vicente de Sola—y solicitó dichos sitios, cuyo Sor. llamó del pueblo de Los Angeles al Comisionado, al Alcalde aun Rejidor y otros varios y preguntandoles si savian qe. si perjudican al pueblo respondieron todos unanimes qe. no. y entonces leyendoles á estos la solicitud del P. ordenando que pusiesen los linderos en dichos sitios como en efecto se verificó.

Dicen estos Ciuds. que la Mision no necesita de estos sitios; á que respondo que la Mision se reduce al puro llano qe. este, para el mes de Junio años siendo buenas las aguas, no hay en el mas qe. pura tierra de donde se sigue por tanto

las manadas como el ganado se retiran para el pue-
30 blo y para adonde pueden de modo que el llano quedo desierto de animales. Ahora pues, agreguese mas al llano la Caballada qe. está en Las Virgenes por no haver otro sitio que tenga pasto y mas dos borregas qe. están en Las Virgenes y Aqua Amarga y si siguera que el llano de fuerte y si lo viere el que para el mes de marso veamos morir de hambre caballada Borregada y demas, como sucedió no solo en il llano el morrir mucho Ganado pero tambien en los sitios espresados murió mucha Borregada por falta de pastos en el ano 25; y de aqui se siguiera el que no habia carne para los Indios ni lana para vestirlos; dejado pues probado que dichos sitios son necesarios pa. la Misn. voy a probar que los ciudadanos no consigueran los intentos que manifiestan, en sus siembras y cultivo--En efecto el finado Miguel Ortega hombre muy aplicado parece, sembró trigo de temporal mas luego lo dejó y no me admiro porque en estas tierras siendo el año de muchas aguas como es necesario para sembrar de temporal de estas muchas humedades resultan las muchas nieblenas y de estas el achaguistarse y perderse el trigo, tambien me dicen sembró un poco de Maiz pero viendo que se la perdia por falta de agua á pesar de que entonces aunqe. fuese muy porquita su agua la pudó aprovechar, lo que no en el dia, porque las
31 barrancas que se formaron en el 25 dejaron perdida mucha tierra lo es imposible la usa de las aguas por su grande profundidad, dicho, finado hacia, como es claro y patente á todos, sus siembras en el pueblo de Los Angeles por consiguiente no sirve dicho sitio para siembra ni cultivo alguno y en los años que la aqua ó lluvias sean escasas ni hay zacate. Es cuanto puedo decir sobre el particular.

FR: FRANCO. GONZALES DE YBARRA.

MONTEREY, *Enero* 22 *de* 1834.

En vista de las antecedentes informes en que se manifiesta una contradicion, librese mandamiento al R. P. Ministro de la Mision de San Fernando para que remita las Constancias que tenga de la consecion hecha por el Sor. Gobernador Dn. Pablo Vicente de Sola del sitio nombrado Las Virgenes pa. en su vista resalver lo conbiniente y devolverselas con las seguridades devidas; suspendiendo entre tanto el curso de este espediente. El Sr. Dn. Jose Figa., Gl. de Brigada Comdte. Gl. Ynspr. y Gefe superior politico del Territorio asi lo mandó, decretó y firmó de que doy fé.

JOSE FIGUEROA.

AUGUSTIN Y ZAMORANO, *Srio.*

32 MZO DE 1834.

Agreguese con el Borrador de la Contestacion al Expediente--de la Materia. Figueroa.

Sor. Genl. Dn. Jose Figueroa, en vista de la solicitud de V. S. en que pretende le mande la constancia qe. tenga de la concesion echa por el Sor. Gov'or Don Pablo Vicente, de Sola del sitio nombrado

las Virgenes--Digo qe. por las copias qe. remito á V. S. consta haverse concedido desde Cahuenga hasta el triunfo colindando con el Conejo y qe. á mas de estar Las Virgenes pegado á la Mission por consigte--mas acá de la Agua amarga y el triunfo camino seguido, al mismo Sor. Gen'l se le advertió é hisó ver como el sitio de Las Virgenes, estaba abandonado y entonces dicho Sor. mandó poner los linderos como dejo dicho--ya probada dichas copias por ámbos S. S. Comandts anteriores á V. S. dichas aprobaciones deben ser equivalentes al despacho que havia en el pueblo. Ultimamente digo que á mas de saber los poblanos qe. dicho documento se archivó en el pueblo de Los Angeles en el ano 17, el Sor. Don Domingo Carrillo y Julio Berdugo saben adonde existe ó deve existir dicho documento y lo podrán decir en conciencia si quisieren.

Ds. Gde á V. S. ms. años.

FR. FRANCO GONZALES DE YBARRA.

San Fernando Febro. 10 de 1834.

33 *Sor. Genl. de Brigada y Gefe Superior Politico de la Calif'a, Dn. Jose Figueroa:*

Las copias de qe. V. R. hace mencion en su oficio de 10 de Febrero, po. po., á mas de que no merecen fé publica por que son simples y sin autorisacion alga. existen en otro expediente distinto ó en podar de V. R. por consiguiente nada se acredita sobre la propriedad que esa mision tiene al paraje de Las Virgines y en el supuesto de haverselo adjudicado el Sor. Governador D. Pablo Victe de Sola, libraria titulo, Despacho u otro documento suficiente que le diese y conservára el dro: de propriedad sin cuya constancia no puede tenerlo--Tampoco he visito la aprovacion ó autorizacion de los señores Gefes mis antecesores á las Copias que menciona V. R. Todo lo que manifesto á V. R. para que, si tiene otras constancias las manifieste á la mayor posible brevadad, porque sin esos requisitos me será dificil ampararlo en la posecion del citado terreno de Las Virgenes. Dios, &c., pueblo de Los Angeles, Marzo 8 de 1834.

F. J. F. [RUBRIC.]

R. P. F. FRANCISCO GONZALES YBARRA, Mntro de la Mision de S. Fernando.

Sello tercero dos Reales.

34 Habilitado provicionalmte, por la administracion de la Aduana maritima de Monterey, para los años de mil ocho cientos treinta y cuatro y mil ocho cientos treinta y cinco.

FIGUEROA. [RUBRIC.]
RAFAEL GONZALES. [RUBRIC.]

MONTEREY, *Septembre* 30 *de* 1834.

No haviendo contestado el padre Ministro de la Mision de San Fernando al ultimo mandamiento sobre que haga constar legalmente que el paraje de Las Virgenes corresponde á dicha Mision y

no deviendo perjudicarse las partes por mas tiempo pase el Alcalde de esta Capital ante quien la parte de Don Domingo Carrillo por si y á nombre de su consocio producirá una informacion de tres testigos idoneos que serán interrogados sobre los puntos siguientes:

1°. Si los solicitantes son ciudadanos por nacimiento, si son casados y tienen hijos; si son de buena conducta.

2°. Si el terreno que pretenden pertenece á la propriedad de algun particular, Mision, pueblo ó corporacion; si es de regadio, temporal ó abrevadero y que estencion tendrá.

35 3°. Si tienen bienes de Campo con que poblarlo ó posibilidad de adquirirlos. Evacuadas estas diligencias vuelva el expediente para su resolucion El Sor. D. Jose Figueroa General de Brigada, Comandante General y Ynspector y Gefe Superior Politico del Territorio de la Alta California asi lo mando, decreto y firmo, de que doy fé.

JOSE FIGUEROA. [RUBRIC.]

AUGUSTIN Y. ZAMORANO, *Scio.* [RUBRIC.]

MONTEREY, 10 *de Octubre de* 1834.

Tomese la informacion de tres testigos idoneos que se manda en el anterior supr. decreto--Asi yo el Alcalde Constitucional lo decreté mandé y firmé con los testigos de assista. con quienes actuo por receptoria en la forma establecida--Doy fé.

MANUEL JIMENO CASARIN. [RUBRIC.]

De assa. De assa.

GUILLO. EDO. HARTNELL. [RUBRIC.]
JOSE AGUILA. [RUBRIC.]

En la fecha presente la parte de Don Domingo Carrillo por si, y á nombre de su consocio; se le notificó el auto que antecede
36 y de él entendido; dijó que lo oye y firmó conmigo y los de assista.

DOMIMGO CARRILLO. [RUBRIC.]
CASARIN. [RUBRIC.]

De assa. De assa.

GUILLO. EDO. HARTNELL. [RUBRICA.]
JOSE AGUILAR. [RUBRIC.]

Sello tercero dos reales.

Habilitado provicionalmente por la Administracion de la Aduana maritima de Monterey para los años de mil ochocientos treinta y cuatro y mil ocho cientos treinta y cinco.

RAFAEL GONZALES. [RUBRIC.]
FIGUEROA. [RUBRIC.]

En la fecha presente Dn. Jose de Jesus Vallejo se le resibió juramento en toda forma de derecho por el cual ofreció decir verdad en lo que supiere y fuese preguntado, y siendolo por su nombre, Estado,

edad, patria y Religion; Dijo llamarse como queda dicho, soltero de treinta y cinco años, natural de este puerto y C. A. R.

Interrogado sobre los tres puntos que menciona el superior decreto del Sor. Gefe politico de fha. 30 del mes ppdo. dijó: que
37 conose á Dn. Domingo Carrillo y á Dn. Nemecio Dominguez que son Ciuds Mejicanos por nacimiento que son casados tienen hijos y son de buena conducta, que tambien conose el terreno que solicitan y no pertenece á la propriedad de ningun particular mision, pueblo y ni á corporacion ninguna--Que dicho terreno no es de Regadio y si, de temporal y abrevadero y que tendrá de longitud como una legua y media poco mas ó menos y de latitud como tres cuartos de legua. Que ultimamente. los mencionados Dn. Domingo Carrillo y Nemecio Dominguez tienen bienes de campo con que poblarlo, que lo dicho es la verdad á cargo del juramento que tiene hecho en el que se afirmó y ratificó leida que le fué esta su declaracion y firmó conmigo y los testigos de assista.

JOSÉ DE JESUS VALLEJO. [RUBRIC.]

De assa.

CASARIN. [RUBRIC.]

De assa.

GUILLO. EDO. HARTNELL. [RUBRIC.]

JOSE AGUILA. [RUBRIC.]

38 In the Superior Court, County of Los Angeles, State of California.

DOMINGA DOMINGUEZ, Plaintiff,
vs.
BRIGIDO BOTILLER *et als.*, Deft's. } No. 2915.

En la fecha presente Salvador Garcia se le recibió juramento en toda forma de derecho por el cual ofreció decir verdad en lo que supiere y fuese preguntado, y siendolo por su nombre, estado, edad, Patria y religion, dijó llamarse como queda dicho soltero, de vunte y nueve años, natural del pueblo de Los Angeles y C. A. R.

Interrogado—sobre los tres puntos que menciona el superior decreto del Señor Gefe Politico de fecha 30 del mes pasado. Dijo que conose a Don Domingo Carrillo y á Nemecio Dominguez, que son ciudadanos Mejicanos por nacimiento, casados, tienen hijos y son de buena conducta. Que tambien conose el terreno que pretenden.

39 Habilitado provicionalmente por la Administracion de la Aduana Maritima de Monterey para los años de mil ocho cientos treinta y cautro y mil ocho cientos treinta y cinco.

FIGUEROA. [RUBRIC.]

RAFAEL GONZALES. [RUBRIC.]

y no pertenece á la propiedad de ningun particular, Mision, y ni á corporacion ninguna, que dicho terreno no es de regadio y si de temporal abrevadero y que tendrá de longitud como una y tres cuartos de legua poco mas ó ménos y de latitud como tres cuartos de legua. Que ultimamente los mencionados ciudadanos, Domingo Carrillo y

Nemecio Dominguez tienen bienes de campo con que poblar dicho terreno, que lo dicho es la verdad á cargo del juramento que tiene hecho, en el quese afirmó y ratificó, leida que le fué esta su declaracion y no firmó porque dijó no sabia lo hize yo con los de assista.

CASARIN. [RUBRIC.]

De assa.

GUILLERMO EDO. HARTNELL.

De assa.

JOSE AGUILA.

En la fecha presente Don Jaun B. Alvarado se le recibió juramento en toda forma por el cual ofreció decir verdad an lo que supiere y fuese preguntado, y siendolo, por su nombre, edad,
40 estado, patria y religion, dijó llamarse como queda dicho, que es soltero do veinte y seis años, natural de este puerto y C. A. R.

Interrogado sobre los tres puntos que menciona el superior decreto del Señor Gefe Politico de fecha treinta del mes pasado. Dijó que conose a los ciudadanos Domingo Carrillo y Nemesio Dominguez, que son Mejicanos por nacimiento, casados, tienen hijos, son de buena conducta; que tambien conose el terreno que pretenden y no pertenece á la propriedad de ningun particular, Mision, pueblo, y ni á corporacion ninguna, que dicho terreno no es de regadio y si, de temporal y abrevadero y que tendrá de longitud como una y media legua, y de latitud como tres cuartos de legua. Que ultimamente los mencianados ciudadanos Domingo Carrillo y Nemecio Dominguez tienen bienes--

Sello tercero Dos Reales.

Habilitado provisionalmente por la Aduana Maritima de Monterey por los años de mil ocho cientos treinta y cuatro y mil ocho cientos treinta y cinco.

FIGUEROA. [RUBRIC.]
RAFAEL GONZALES. [RUBRIC.]

41 --de campo con que poblarlo, que lo dicho es la verdad á cargo del juramento que tiene hecho en el que se afirmó y ratificó, leida que le fué esta su declaracion y firmó conmigo y los testigos de assistencia. Lo tachado no vale.

De assa.

CASARIN. [RUBRIC.]

De assa.

JUAN B. ALVARADO. [RUBRIC.]
GUILLERMO EDO. HARTNELL. [RUBRIC.]
JOSE AGUILA. [RUBRIC.]

MONTEREY, 10 *de Octubre, de* 1834.

Concluidas las antecedentes diligencias vuelve el expediente al Señor Gefe Superior Politico para su resolucion, asi yo el Alcalde

Constitucional lo decreté, mandé y firmé con los de Assistencia en la forma establecida.

Doy fé.

MANUEL JIMENO CASARIN. [RUBRIC.]

De assa.

GUILLERMO EDO. HARTNELL. [RUBRIC.]

De assa.

JOSE AGUILA. [RUBRIC.]

MONTEREY, *Octubre* 10 *de* 1834.

Vista la peticion con que da principio el informe de la autoridad municipal del pueblo de Los Angeles, las exposiciones de
42 testigos con todo lo demas que se tubó presente y ver convino de conformidad con lo dispuesto por las leyes y reglamentos de la meteria se declara á los ciudadanos Domingo Carrillo y Nemesio Dominguez duenños en propriedad del terreno conocido con el nombre de Las Virgenes, colindante con la Mision de San Fernando y el Rancho del Conejo sujeto á las condiciones que se estipularon: librase el Despacho correspondiente; tomase razon en el libro respectivo, dirijase este Espediente para la devida aprobacion á la Excellentisima Diputacion Territorial en cuyo caso los interesados á quienes se les harán saber este decreto, presentarán nuevamente su titulo para que se les ravalide. El Señor Don Jose Figueroa, General de Brigada, Comandante General, Ynspector y Gefe Superior Politico de la Alta California, asi lo mandó, decretó y firmó, de que doy fé.

JOSE FIGUEROA. [RUBRIC.]

AGUSTIN Y. ZAMORANO, *Srio.* [RUBRIC.]

José Figueroa, General de Brigada de la Republica Mejicana, Comandante General, Ynspector y Gefe Superior Politico del Territorio de la Alta California.

Por cuanto los ciudadanos Domingo Carrillo y Nemesio Dominguez, Mejicanos por nacimiento han pretendido para su ben-
43 eficio personal y él de sus familias el terreno conocido con el nombre de Las Virgenes, colindante con la Mision de San Fernando y el Rancho del Conejo; practicadas previamente las diligencias y averiguaciones consernientes segun lo dispuesto por leyes y reglamentos, usande las facultades que me son conferidas, á nombre de la Nacion Mejicana, por decreto de este dia he venido en conferirles el terreno men cionado de Las Virgenes á los espresados ciudadanos Domingo Carrillo y Nemesio Dominguez, declarandoles la propriedad de él por las presentes letras, entendiendose dicha consecion con entera conformidad á lo dispuesto por las leyes, á reserva de la aprobacion ó desaprobacion de la Excellentisima Diputacion Territorial y del Supremo Gobierno y bajo las condiciones siguientes.

Ia. Que se sometaran á las que estableciere el Reglamento que se ha de formar para la distribucion de terrenos valdios y que entre tanto ni los agraciados ni sus herederos podrán dividir ni enagenar

él que se les adjudica: imponer censo, vinculo, fianza, hipoteca, ni otro gravamen aunque sea para causa piadosa ni pasarlo á manos muertas.

2a. Podran cercarlo sin perjudicar las travesias, caminos
44 y servidumbres; lo disfrutaran libre y esclusivamente destinandolo al uso y cultivo que mas les acomode; pero dentro de un año á lo mas fabricarán casa y estará habitada.

3a. Cuando se les confirme la propriedad solicitaran del Juez respectivo que les dé posecion juridica, en virtud de este despacho; por el cual se demarcaran los linderos, en cuyos limites pondrán á mas de las mojoneras algunos arboles frutales ó silvestres de alguna utilidad.

4a. El terreno de que se les hace donacion es de cuatro sitios de ganado mayor, poco mas ó ménos, segun esplica el diseño que corre en el Espediente. El Juez que diere la posecion lo hará medir conforme á ordenanza para señalar los linderos quedando el sobrante que resulte á la Nacion para los usos convinientes.

5a. Si contravinieren á estas condiciones perderán su derecho al terreno y será denunciable por otro.

En consecuencia mando que sirviendoles de titulo el presente y teniendose por firme y valedero se tome razon en el libro á que corresponde y se entregue á los interesados para su resguardo y demas fines.

Dado en Monterey á 1o de Octubre de 1834.

JOSE FIGUEROA. [RUBRIC.]
AUGUSTIN Y ZAMORANO, *Secrto.*

45 MONTEREY, *Agosto* 27 *de* 1835.

En sesion de este dia acordó la Excelentisima Diputacion la consecion de terrenos valdios.

FIGUEROA.
JOSE MARIA MALDO, *Srio.*

Excelentisimo Señor:—La Comision de Terrenos impuesta del espediente que se mandó practicar para pretencion que los Ciudadanos Alferez Domingo Carrillo y Nemesio Dominguez han hecho al terreno nombrado Las Virgenes: no encontrando en él ovjeccion alguna que hacer, y siendo en todo conforme á la ley de 18 de Agosto, de 1824, como al Articulo 5o del Reglamento de 21 de Noviembre de 1828, ofrese á la deliberacion de Vuestra Excelencia la siguiente proposicion:

Se aprueba la consecion hecha á los Ciudadanos Alferez Domingo Carrillo y Nemesio Dominguez del parage nombrado Las Virgenes, consedido á lo de Octubre de 1834.

Monterey 28 de Agosto, de 1835.

JOSE CASTRO. [RUBRIC.]

AGOSTO 29 DE 1835.

En sesion de este dia approvó la Excelentisima Diputacion el ante-

cedente dictamen y se acordó pase el Espediente al Señor Gefe Politico para su conclusion.

JOSE MARIA MALDONADO, *Srio.* [RUBRIC.]

46 OFFICE OF THE SURVEYOR GENERAL OF THE UNITED STATES FOR CALIFORNIA.

I, Lauren Upson, surveyor general of the United States for the State of California, and as such having in my office and under my custody a portion of the archives of the former Spanish and Mexican territory or department of Upper California, do hereby certify that the twenty preceding and hereunto-annexed pages of tracing paper, numbered from one to twenty, inclusive, exhibit a full, true, and correct copy of the espediente of the grant of Rancho Las Virgenes to Domingo Carrillo and Nemesio Dominguez, which espediente is endorsed: Civil, sobre el terreno nombrado Las Virgenes, por los Ciudadanos Alferez Domingo Carrillo y Nemesio Dominguez, as the same is on file in my office.

In testimony whereof I have hereunto signed my name officially and caused my seal of office to be affixed, at the city of San Francisco, this 31st day of December, 1866.

[SEAL.] L. UPSON,
United States Surveyor General for California.

47 [Endorsed:] No. 2915. Dominga Dominguez *vs.* Brigido Botiller, *et al.* Plaintiff's Exhibit A. Filed May 5th, 1885. Chas. H. Dunsmoor, clerk, by A. N. Hamilton, deputy.

José Figueroa, General de Brigada de la Republica Mijicana, Comandante General, Ynspector y Gefe Superior Politico del Territorio de la Alta California.

Por cuanto los Ciudadanos Domingo Carrillo y Nemesio Dominguez, Mejicanos por nacimiento, han pretendido para su beneficio personal y el de sus familias, el terreno conocido con el nombre de Las Virgenes, colindante con la Mision de San Fernando y el Rancho del Conejo; practicadas previamente las diligencias
48 y averiguaciones consernientes segun lo dispuesto per leyes y reglamentos, usando de las facultades que me son conferidas, á nombre de la Nacion Mejicana, por decreto de este dia he venido en conferirles el terreno mencionado de Las Virgenes á los espresados Ciudadanos, Domingo Carrillo y Nemesio Dominguez, declarandoles la propriedad de él por las presentes letras entendiendose dicha consecion con entera conformidad á lo dispuesto por las leyes, á reserva de la aprobacion ó desaprobacion de la Excelentisima Diputacion Territorial y del Supremo Gobierno y bajo de las condiciones siguientes:

1a. Que se someterán á las que estableciere el Reglamento que se ha de formar para la distribucion de terrenos valdios y que entre tanto ni los agraciados, ni sus herederos podran dividir ni enagenar él que se les adjudica: imponer senso, vinculo, fianza, hipoteca, ni otro gravamen, aunque sea por causa piadosa ni pasarlo á manos muertas.

2a. Podran cercarlo sin perjudicar las travesias, caminos y servidumbres: lo disfrutaran libres y esclusivamente destinandolo al uso y cultivo que mas les acomode; pero dentro de un año á lo mas fabricarán casa y estará habitada.

3a. Cuando se les confirme la propriedad solicitarán del
49 Juez respectivo que les dé posecion juridica en virtud de este despacho, por el cual se demarcaran los linderos en cuyos limites pondrán á mas de las mojoneras algunos arboles frutales ó silvestres de alguna utilidad.

4a. El terreno de que se les hace donacion es de cuatro sitios de ganado mayor, poco mas ó ménos, segun esplica el diseño que corre en el en el Espediente; el Juez que diere lo posecion lo hará medir conforme á ordenanza para señalar los linderos quedando el sobrante que resulte á la Nacion para los usos convinientes.

5a. Si contravinieren á estas condiciones perderan su derecho al terreno y será denunciable por otro.

En consecuencia mando que sirviendoles de titulo el presente teniendose for firme y valédero se tome razon en el libro á que corresponde y se entregue á los interesados para su resguardo y demas fines.

Dado en Monterey á 1o de Octubre de 1834.

JOSE FIUGEROA.
AGUSTIN V. ZAMORANO, *Srio.*

Queda tomada razon de este titulo sobre adjudicacion de terrenos á fojas cincuenta y tres, numero cincuenta y uno que obra en la secretaria de mi cargo.

En Monterey, á 1o de Octubre de 1834.

ZAMORANO.

50 Civil, in relation to the tract of land named Las Virgenes, by the citizens Domingo Carrillo y Nemesio Dominguez, No. 54.

En el Pueblo Los Angeles á nueve de Junio de mil ocho cientos treinta y cinco, anuente á la solicitud de los Señores Don Domingo Carrillo y Don Nemesio Dominguez á fin de que se les dé la correspondiente posesion del sitio y Rancho llamado de Las Virgenes, concedido por el Gobierno Politico de este Territorio, y haviendo convenido el agrimensor D. Abel Stearns para que remida el enunciado terreno con total arreglo á las primeras medidas que se han practicado, cuyo diseño se agregará al Espediente, pasese por mi y los testigos de mi assistencia al expresado sitio, y procedase á dar la posesion indicada arreglandose al titulo ó despacho que se les ha conferido por la Gefetura. El Ciudadano Francisco Javier Alvarado, Alcalde 1o Constitucional de este Pueblo así lo dereté y mandé y firmé con los testigos de mi assistencia—doy fé. Francisco Javier Alvarado, Assa. Francisco Arzaga, Assistencia, Rafael Gallardo. En el Rancho de Las Virgenes á los nueve dias del mes de Junio de mil ocho cientos treinta y cinco, el Juez que subscrive habiendo hecho citacion de colindantes, y habiendo comparecido el Mayor-

domo de la Ex-Mision de San Fernando Pedro Lopez y Jacinto
51 Lorenzana accionista del Rancho del Conejo, les hize saber el objeto conque me habia conducido aquel paraje, y que en este caso presentasen los documentos que respectivamente tuviesen ó de cuales-quiera otro modo manifestáran si tenian derecho alguno en aquel terreno; pues iba remedirlo y poner en posecion de él á Don Domingo Carrillo y Don Nemesio Dominguez.—No habiendo presentado documentos ningunos, ni manifestado ecepciones que pudieron suspender las medidas, les dije iba á proceder á ellas: lo que pongo por diligencia, que autoriza y firma con los testigos de mi asistencia segun derecho—doy fé.

FRANCISCO J. ALVARADO. [RUBRIC.]
BASILIO VALDEZ.
RAFAEL GALLARDO.

En el Rancho de Las Virgenes á diez de Junio, de mil ocho cientos treinta y cinco, yo, el propio Juez para la practica de estas diligencias, nombré dos oficiales medidores y dos oficiales cordeleros que por no saber firmar se omiten sus nombres, á quienes les hize saber su nombramiento, él que aceptaron bajo juramento que otorgáron ofreciendo desempeñar fielmente su encargo, lo que autorizé y firmé con los testigos de mi assistencia segun derecho.

FRANCISCO JAVIER ALVARADO.
BASILIO VALDEZ.
RAFAEL GALLARDO.

52 En el mismo mes y año, estando en el paraje que llaman Chiquero Antiguo de las Borregas que colinda con una sierra que divide el Rancho de Don Tiburcio Tapia á efecto de verificar las re-medidas y posecion que corresponde á los Señores Don Domingo Carrillo y Don Nemesio Dominguez del sitio nombrado de Las Virgenes, previos todos los requisitos de ley, y estando ante mi los testigos de asistencia, los oficiales, cordeleros y el Agrimensor Don Abel Stearns, hize medir un cordel que contenia ciento treinta y cinco varas, el cual fué examinado y reconocido por el enunciado Agrimensor, y haciendo á sus extremos unos sancos de madera previa observacion y calculo del repetido agrimensor, por su disposicion se tiró el cordel al pié de una sierra pequeña la cual se tomó como señal de mojonera por el Norte, rumbo Este, diez grados al Norte se midiéron y contáron seis mil seiscientas varas. En seguida, tirando la cuerda rumbo Sur sesenta grados al Este, se midieron y contáron seis mil varas, las que rematáron en una cañada que pega contra una sierra donde se señalo por mojonera un encino grande al cual se le cortó un brazo, y se le hizó igualmente una cruz. Prosiguiendo la medida, se tiro la cuerda rumbo Norte y se midiéron y contáron echo mil seiscientas varas, que remataron cerca del camino
53 real, en la boca de una cañada. En este estado mande suspender las medidas por ser una hora importuna, para continuarlas el dia de mañana, y lo firmó conmigo el agrimensor y los testigos de assistencia—doy fé. Francisco J. Alvarado—Basilio Valdez—Rafael Gallardo—entre renglones seiscientas varas—vale—Abel

Stearns. En el mencionado parage, y en prosecucion de las presentes diligencias, presentes los testigos de mi asistencia, los oficiales medidores, los cordeleros y el Agrimensor, por disposicion de este se tiró la cuerda rumbo Norte sesenta y cinco grados Este, y se midiéron y contáron siete mil doscientas varas, y donde estas remataron ordené pusiese una señal ó mojonera. En seguida se tiró un cordel rumbo Norte y se midiéron y contáron mil cien varas las que rematáron en la cima de una lomita donde se púso por mojonera una cruz, y fué en el sitio que divide los terrenos de la Ex-Mision de San Fernando. Consecutivamente se tiró el cordel rumbo Oeste y se midiéron y conátron nueve mil cuatro cientas varas, que remataron al pie de una sierra cerca donde actualmente está un corral de borregas. Prosiguiendo las medidas se tiró el cordel rumbo Sur, donde se midieron y contáron cuatro mil cien varas, las que remataron al pie de otra sierra, y seguidamente se prosiguió con el cordel rumbo Oeste y se midiéron y contáron ocho mil nuevecientas
54 varas, las que remataron al pie de la sierra donde está una cañada que divide el rancho del Conejo. Para la prosecucion de estas medidas se tiró la cuerda rumbo Sur y se midiéron y contáron seis mil sietecientas cincuenta varas, rematando en el paraje donde se empezaron las medidas, donde hace esquina rumbo Noroeste, con lo que se concluyéron las medidas de este sitio á satisfacion de los interezados, á lo que les ordené pusiéran las correspondientes mojoneras en los puntos donde corresponden, y quedáron entendidos, lo que pongo por diligencias que autorizo y firmo con el Agrimensor y testigos de asistencia.

FRANCISCO J. ALVARADO.
RAFAEL GALLARDO.

BASILIO VALDEZ.

Tachado—rumbo—no—vale.
Angeles, Junio 22 de 1835.

ABEL STEARNS.

Désele testimonio á las partes de las presentes diligencias en papal comun por no haber del que corresponde.

Francisco Javier Alvarado—Alcalde Constitucional de este Pueblo y su Jurisdicion, asi lo decretó, mandó y firmó por ánte los testigos de mi asistencia.

FRANCISCO J. ALVARADO.
RAFAEL GALLARDO.

BASILIO VALDEZ.

55 Concuerda con su original á que me remito del caul está fielmente sacado, corregido y confrontado, y existe en el libro de instrumentos publicos del año de mil ocho cientos treinta y cinco, y se sacó en estas siete fojas de papel comun, por no haber del sellado, hoy 24 de Setiembre, de 1841.

Yo, el 2o Juez de Paz, doy fé.
(Signed) YGNO. MA. ALVARADO. [RUBRIC.]
Assa.
(Signed) YGNO. CORONEL. [RUBRIC.]
Assa.
(Signed) CARLOS BARIC. [RUBRIC.]

Derechos seis pesos.

It is stipulated that the foregoing is a full, true, and correct copy of the original in the custody of the U. S. surveyor general for California and properly authenticated by him, and endorsed Plaintiff's Exhibit "B."

DOMINGUEZ *vs.* BOTILLER *et al.*

56 No. 51.

Civil.

(Translation.)

In relation to the tract of land named "Las Virgenes," by the citizens Domingo Carrillo and Namecio Dominguez.

54.

To the superior political chief:

We, the citizens Domingo Carrillo, ensign of the regular cavalry, company of Santa Barbara, and Nemecio Dominguez, a resident of the city of Our Lady of Los Angeles, the first in the name of five minor children of his family, before your honor, in due form of law, represent that, for the purpose of advancing the interests of both families, we desire to cultivate and improve in the best manner a tract of land situated twelve leagues to the west of the pueblo of Our Lady of Los Angeles, called "Las Virgenes," a map (deseño) of which is herewith duly presented, which will inform your honor of its location and circumstances. This tract of land was at one time occupied by a resident of said pueblo, named Miguel
57 Ortega, who having died on a journey, his only heir left the place, and the tract of land remains vacant and abandoned.

It is about five leagues distant from the mission of San Fernando, towards the coast, which mission has since its abandonment caused a small number of sheep to be placed thereon, without needing it for a sheep rancho.

Wherefore it will not be strange if the mission should interpose some objection to our petition for the purpose of defeating the same.

Wherefore we submit this petition to the just consideration of your honor, in view of which you will be pleased to cause such reports to be made as may be deemed proper, repeating our earnest

desire to promote the best interests of our children and to stimulate in them a desire for improvement and prosperity, being pleased to accept this petition on common paper, since in this place there is no stamped paper.

Santa Barbara, October 18th, 1833.

DOMINGO CARRILLO.
NEMECIO DOMINGUEZ.

MISSION OF SAN FRANCISCO, *Nov. 4th*, 1833.

In conformity with the laws on the subject, let the ayuntamiento (town council) of the pueblo report if the interested parties
58 in this petition possess such requisites as entitle them to be heard; if the land petitioned for is embraced within the twenty leagues bordering on a foreign territory or the ten leagues bordering on the sea-shore, as expressed in the law of the 18th of August, 1824; if it has pertained or does pertain to the property of any individual, corporation, presidio, or pueblo; or if it is recognized as vacant; if it is irrigable, suitable for sowing, or only fitted for pasturage, with all other circumstances — may serve to throw light upon the matter; and when this report shall have been made let the expediente be passed to the reverend father minister of the mission of San Fernando for his report thereon; whereupon it will be returned to this office of the government.

FIGUEROA.

PUEBLO OF LOS ANGELES, *Nov. 31st*, 1833.

This illustrious ayuntamiento, at a meeting held on the 18th of the current month, in obedience to the foregoing decree of the señor political chief, report that the petitioners referred to in the foregoing representation possess such requisites as entitle them to be heard; that they have sufficient means to stock the place for which they petition; that the said place is considered as vacant, and that
59 fifteen years since, a little more or less, it was abandoned by one of the heirs of the deceased Miguel Ortega, who was the owner thereof; that some portions of the tract in question are suitable for the sowing of grain, and that there is but a small portion thereof that is susceptible of irrigation. It is situated about three leagues distant from the sea-shore and about six leagues from the mission of San Fernando.

This is all that this ayuntamiento says in relation to the matter.

FELIPE LUGO.

VICENTE MORAGA, *Sec'y*.

SAN FERNANDO, *November 22d*, 1833.

SEÑOR GENERAL: In relation to the report which you require of me in relation to the petition of the citizens referred to, concerning the places of "Las Virgenes," "Agua Amarga," and "Triunfo," I have to say that in the year 17 (1817) the three places were vacant; since, although Las Virgenes had belonged to an individual, on his death his son abandoned the place and left it, for which reason it is to be considered as vacant.

During said year the señor minister of this mission, finding
60 that he could not feed and clothe the Indians for want of a place on which to place the stock necessary for this purpose, represented this necessity to the Señor Governor, Don Pablo Vicente de Sola, and petitioned for said places; whereupon the Governor summoned from the pueblo of Los Angeles a commissioner, the alcalde and regidor and other residents, and asking them "if the pueblo would be prejudiced" (by granting the request of the minister), they unanimously answered no; whereupon he read to them the petition of the Señor Urdidoz that the boundaries should be fixed, which in fact was done.

These citizens say that the mission does not need these places; to which is answered that the mission is limited to the mere plain, and that this, about the month of June, even in years of abundant rain, is destitute of pasture, for which reason it is necessary to take the stock towards the pueblo, or other places where pasture can be found, so that the plain is deserted by the stock. Now, if the horses which are on Las Virgenes should be placed on the plain for want of any other place, and besides two flocks of sheep which are on "Las Virgenes" and "Agua Amarga," the result will be that towards the month of March horses, sheep, and other stock will die of hunger, as has happened not only on the plain, in the year
61 '25, but also many sheep died for want of pasture, the result of which was that there was no meat to feed the Indians nor wool to clothe them, which proves that said places are necessary to the mission. I will prove that these citizens will not carry out the intentions that they allege of sowing and cultivating. In fact, the deceased, Miguel Ortega, who was a very industrious man, it appears, sowed wheat and did not harvest it, because on these lands during years in which there is much rain, which is necessary for sowing grain, there is much fog and dampness, which causes the wheat to rust; and I am told he planted a little corn, which perished for want of water, notwithstanding the little water there was on the land could then be utilized, which cannot now be done, because the "barrancas" (gullies), which were formed in the year '25 and which destroyed much land, are so deep that it is impossible to take the water therefrom, for which reason the deceased (Ortega) made his sowings in the pueblo of Los Angeles. Wherefore said place is not suitable for sowing or cultivation of any kind, and in the years when there is but little rain it does not produce pasture.

This is all that I can say on the subject.

FR. FRANCISCO GONZALES YBARRA.

62 MONTEREY, *January 22nd*, 1834.

In view of the foregoing reports, in which contradiction is shown, let an order be issued to the reverend father minister of the mission of San Fernando, requiring him to furnish such proof as he may have of the concession made by the Señor Governor, Don Pablo Vicente de Sola, of the place named "Las Virgenes," that in view thereof the matter may be properly determined, making due

return of the same, the proceedings in the meantime being suspended.

The Señor General, Don José Figueroa, brigadier general, commandant general, inspector, and superior political chief of the Territory, thus ordered, decreed, and signed, which I attest.

JOSE FIGUEROA.

AUGUSTIN V. ZAMORANO, *Sec'y.*

(Here follows map.)

MARCH 8th, 1834.

Let this, with borrador (draft) of the reply, be annexed to the expediente (proceedings) on the subject.

FIGUEROA.

To the Señor General Don Jose Figueroa:

In view of the request of your honor asking for the proofs that I may have of the concession made by the Señor Governor, Don Pablo Vicente de Sola, of the place named Las Virgenes, I
63 have to say that by the copies which I transmit to your honor it will be seen that the tract extending from the Caguenga, as far as el Triunfo, was conceded, bounding with the Conejo, and that besides this Las Virgenes, adjoining the mission, is consequently on this side of the Agua Amarga and el Triunfo, following the road. To the same señor general it was represented and made to appear that the place of Las Virgenes was abandoned; whereupon the said señor ordered the boundaries to be placed as I have said, and said copies being approved by both of the señores commandantes, predecessors of your honor, said approvals were considered as equivalent to the despatch which was lately in the pueblo. I say that, besides the knowledge of the inhabitants of the pueblo that said documents were filed in the archives of the pueblo of Los Angeles in the year 1817, the Señor Don Domingo Carrillo and Julio Verdugo know where they exist, or should exist, and therefore can so tell if they desire.

May God preserve the life of of your honor many years.

San Fernando, Feb'y 10, 1834.

FR. FRANCISCO GONZALES DE YBARRA,
Señor Brigadier General and Political Chief of California.

DN. JOSE FIGUEROA.

64 The copies referred to by your reverence in your report of the 10th of February last past, besides not being entitled to credit, since they are not certified, exist in another expediente or record, distinct or in the possession of your reverence; wherefore they prove nothing in relation to its ownership by that mission of the place of Las Virgenes, for, supposing that the Señor Governor, Don Pablo Vicente de Sola, adjudicated the same, he would have issued a title or order or some kind of document sufficient to have

shown the ownership of the property, without which showing it cannot be alleged. Neither have I seen the approval or authorization of the chiefs, my predecessors, of the copies referred to by your reverence.

All of which I represent to your reverence to the end that if you have any other proofs you may furnish them at your earliest convenience, since without such requisites it will be difficult for me to sustain you in the possession of the said lands of Las Virgenes.

God preserve your reverence many years.

Pueblo of Los Angeles, March 8th, 1834.

JOSE FIGUEROA.

To the Reverend Father Fr. Francisco Gonzales Ybarro, minister of the mission of San Fernando.

65 Seal third, twenty-five cents, provisionally authorized by the maritime custom-house of Monterey for the years 1834 and 1835.

Monterey, September 30th, 1834.

RAFAEL GONZALES.

FIGUEROA.

The father minister of the mission of San Fernando, not having responded to the last order requiring him to show that the place of Las Virgenes legally belongs to said mission and not desiring that the parties shall be longer prejudiced, let the matter be passed to the alcade of this capital, before whom the petitioner, Don Domingo Carrillo, for himself and in the name of his associate, shall produce three competent witnesses, who shall be interrogated upon the following points:

First. If the petitioners are citizens by birth, if they are married and have children, and if they bear good characters.

Second. If the land petitioned for pertains to the property of any individual, mission, pueblo, or corporation; if it is irrigable or only suitable for sowing and pasturage, and what may be its extent.

Third. If the petitioners possess sufficient means to stock the place or the possibility of acquiring the same.

66 And when these proceedings shall have been taken let the expediente be returned for the resolution thereof. The Señor Don José Figueroa, brigadier general, commandant general, inspector, and superior political chief of the Territory of Alta California, thus ordered, decreed, and signed, which I attest.

JOSE FIGUEROA.

AUGUSTIN V. ZAMORANO.

MONTEREY, *October* 1*st*, 1834.

Let the testimony of three competent witnesses be taken, as ordered by the foregoing decree.

Thus I, the constitutional alcade, decreed, ordered, and signed,

with the assistant witnesses, with whom I act, in the established form, to which I attest.

MANUEL JIMENO CASARIN.

Assistant:
WM. EDWARD HARTNELL.
Assistant:
JOSE AGUILA.

At the same date Don Domingo Carrillo, being present for himself and in the name of his associate, he was notified of the foregoing order, which he said he heard, and signed with me and the assistants.

DOMINGO CARRILLO.

Assistant:
CASARIN.
Assistant:
WM. EDWARD HARTNELL.

67 At the same date Don José de Jesus Vallejo, being present, *he* made oath in due form of law, under which he offered to speak the truth, as far as he knew, in reply to the questions asked him; and being questioned as to his name, condition, age, country, and religion, he replied that his name was as stated; unmarried; thirty-five years of age, a native of this port, and an apostolic Roman Catholic.

Being interrogated upon the three points mentioned in the decree of the superior political chief of the 30th of the month last past, he said that he knows Don Domingo Carrillo and Don Nemecio Dominguez; that they are Mexican citizens; are married; have children, and of good characters; that he also knows the land for which they petition, and that it does not pertain to the property of any individual, mission, pueblo, or corporation; that the said land is not irrigable, but only suitable for grain-sowing and grazing, and that its extent is about a league and a half, a little more or less, in length, and about three-quarters of a league in width.

Finally, that the said Don Domingo Carrillo and Nemecio Dominguez have sufficient stock to stock said place; that the foregoing is the truth under the oath he has made, which he affirmed
68 and ratified after the same had been read to him, and signed with me and the assisting witnesses.

CASARIN.
JOSE DE JESUS VALLEJO.

Assistant;
WM. EDWARD HARTNELL.
Assistant:
JOSE AGUILAR.

At the same date Salvador Garcia, being present, *he* made oath in due form of law, under which he offered to speak the truth, to

the best of his knowledge, in answer to such questions as might be asked him; and being questioned as to his name, condition, age, country, and religion, he replied that his name was as stated; a bachelor, twenty-nine years of age; a native of the pueblo of Los Angeles, and an apostolic Roman Catholic.

Being questioned upon the three points mentioned in the superior decree of the señor politicál chief of the 30th of the month last past, he replied that he knows Don Domingo Carrillo and Nemecio Dominguez; that they are Mexican citizens by birth; married; have children, and that they are of good characters; that he also knows the land for which they petition, and that it does not pertain to the property of any individual, pueblo, mission, or corporation whatever; that said land is not irrigable, but is only suitable for
69 grain-sowing and grazing, and that its extent is about a league and three-quarters in length; and, finally, that the said citizens, Domingo Carrillo and Nemecio Dominguez, have stock with which to stock said place; that what he has stated is the truth under the oath which he has made, which he affirmed and ratified after his declaration had been read to him, not signing because he said he could not write, and I signed with the assistants.

CASARIN.

Assistant:
WM. EDWARD HARTNELL.
Assistant:
JOSE AQUILAR.

At the same date Don Juan B. Alvarado, being present, made oath in due form of law, under which he offered to speak the truth, to the best of his knowledge, in reply to such questions as might be asked him; and being asked as to his name, condition, age, country, and religion, he replied that his name was as stated; that he was a bachelor, twenty-five years of age; a native of this port, and an apostolic Roman Catholic.

Being interrogated upon the three points mentioned in the superior decree of the señor political chief of the 30th of the month last past, he said that he knows the citizens Domingo Carrillo and Nemecio Dominguez, and that they are Mexicans by birth; married;
70 have children, and are of good character; that he also knows the land for which they petition; that it does not pertain to the land of any individual, mission, pueblo, or corporation whatever; that said land is not irrigable and is only suitable for grain-sowing and grazing; that it is about a league and a half in length and about three-quarters of a league in width. Finally, that the said citizens, Domingo Carrillo and Nemecio Dominguez, have stock with which to stock said place; that what he has stated is the truth under the oath which he has made, which he affirmed and

ratified after his declaration had been read to him, signing with me and the assistants.

CASARIN.
JUAN B. ALVARADO.

Assistant:
WM. EDW'D HARTNELL.

Assistant:
JOSE AQUILAR.

The foregoing proceedings being concluded, the expediente is returned to the señor superior political chief for his resolution. Thus, I, the constitutional alcade, decreed, ordered, and signed with the assisting witnesses in the established form, which I attest.

Monterey, October 1st, 1834.

MANUEL JIMENO CASARIN.

Assistant:
WM. EDW'D HARTNELL.
JOSE AGUILAR.

71 MONTEREY, *October 1st*, 1834.

In view of the petition with which these proceedings commence, the report of the municipal authority of the pueblo of Los Angeles, the testimony of witnesses, and all other matters necessary to be considered in conformity with the requirements of the laws and regulations on the subject, the citizens Domingo Carillo and Nemecio Dominguez are declared owners in property of the lands known by the name of "Las Virgenes," bounding with the mission of San Fernando and the rancho of the Conejo, subject to the conditions to be stipulated, let the corresponding title (despatcho) issue; let registry be made thereof in the corresponding book, and let this expediente be sent to the most excellent territorial deputation for its due approval, in which case (if approved) the parties interested, to whom this decree shall be made known, will present their title anew, that the same may be revalidated. The Señor Don José Figueroa, brigadier general, commandant general, inspector and superior political chief of Alta California, thus ordered, decreed, and signed, which I attest.

JOSE FIGUEROA.

AUGUSTIN V. ZAMORANO, *Sec'y.*

72 José Figueroa, brigadier general of the Mexican Republic, commandant general, inspector, and superior political chief of the Territory of Alta California:

Whereas the citizens Domingo Carrillo and Nemecio Dominguez, Mexicans by birth, have petitioned for their personal benefit and that of their families the tract of land known by the name of Las Virgenes, bounding with the mission of San Fernando and the rancho of the Conejo; the necessary proceedings having been taken

and the investigations made, as required by the laws and regulations on the subject, in exercise of the faculties conferred on me, in the name of the Mexican nation, by decree of this day, I have determined to confer on them the said land of Las Virgenes, to the said citizens Domingo Carrillo and Nemecio Dominguez, declaring to them the ownership thereof by these present letters, said concession being understood to be in entire conformity to the requirements of the laws, subject to the approval or disapproval of the most excellent territorial deputation, and to that of the supreme government, and under the following conditions:

First. That they shall be subject to the (conditions) to be established by the regulations to be formed for the distribution of
73 vacant lands, and that in the meanwhile neither the grantees nor their heirs will be able to divide or alienate that which is adjudicated to them, impose on it ground rent, bond or mortgage, nor any other encumbrance, although it should be for pious purposes, nor convey it in mortmain.

Second. They may enclose it without prejudice to the crossings, roads, and servitudes; they shall enjoy it freely and exclusively, devoting it to such use and cultivation as may be most convenient; but within one year at the most they shall build a house thereon, which shall be inhabited.

Third. When the ownership shall be confirmed to them they shall solicit the proper judge to give them judicial possession by virtue of this title, by which the boundaries shall be marked out and on the limits of which shall be placed, besides the monuments, some fruit trees or useful forest trees.

Fourth. The land of which donation is made is of the extent of four leagues, a little more or less, as is explained by the map in the expediente. The judge who may give the possession will cause the land to be measured in accordance with the ordinances for the designation of boundaries, the surplus that may result to remain to the nation for its convenient uses.

74 Fifth. If they violate these conditions they will lose their right to the land and it will be denounceable by another.

In consequence whereof I order that this serving them as a title, and being held as firm and valid, registry be made thereof in the corresponding book, and that it be delivered to the interested parties for their security and further ends.

Given in Monterey on the 1st of October, 1834.

JOSE FIGUEROA,
AUGUSTIN ZAMORANO.

MONTEREY, *August* 27, 1835.

In the session of to-day the most excellent deputation resolved the concession of vacant lands.

FIGUEROA,
JOSE MA. MALDONADO.

MOST EXCELLENT SIR: The committee on vacant lands having examined the expediente (proceedings) ordered to be taken on the pe-

tition of the citizens Ensign Domingo Carrillo and Nemecio Dominguez for the land named Las Virgenes and finding no objection thereto, they being in all respects in accordance with the law
75 of the 18th of August, 1824, as well as with article 5 of the regulations of the 21st of November, 1828, offer for the deliberation of your excellency the following proposition:

The concessions made to the citizens Ensign Domingo Carrillo and Nemecio Dominquez of the place named Las Virgenes, on the 1st of October, 1834, is approved.

Monterey, August 28, 1835.

JOSE CASTRO.

AUGUST 29, 1835.

In the session of to-day the excellent deputation approved and affirmed the foregoing report of the committee and ordered the expediente to be passed to the political chief for his resolution.

JOSE MA. MALDONADO, *Secretary.*

Record of Title.

No. 51.

José Figueroa, brigadier general of the Mexican Republic, commandant general, inspector, and superior political chief of Alta California:

76 Whereas the citizens Domingo Carrillo and Nemecio Dominguez, Mexicans by birth, have petitioned for their personal benefit and that of their families for the tract of land known by the name of Las Virgenes, bounding with the mission of San Fernando and the rancho of the Conejo, the necessary proceedings having been taken and the investigations made as required by the laws and regulations on the subject, in exercise of the faculties conferred on me, in the name of the Mexican nation, by decree of this day, I have determined to confer on them the land of the said Las Virgenes to the said citizens, Domingo Carrillo and Nemecio Dominguez, declaring to them the ownership thereof by these present letters, said concession being understood to be in entire comformity with the requirements of the laws, and subject to the approval or disapproval of the most excellent territorial deputation and to that of the supreme government, and under the following conditions:

First. It will be subject to the conditions expressed in the regulations to be formed for the distribution of public lands, and in the meanwhile neither the grantees nor their heirs shall be able to divide or alienate that which is adjudicated to them, impose on it
77 ground rent, bond or mortgage, nor any other encumbrance, although it should be for pious purposes, nor convey it in mortmain.

Second. They can enclose it without prejudice to the crossings, roads, and servitudes; they shall enjoy it freely and exclusively, de-

voting it to the use or cultivation that may be most convenient, but within one year at the most they shall build a house thereon, which shall be inhabited.

Third. When the ownership of the land may be confirmed to them, they shall solicit the respective judge to give them judicial possession by virtue of this title, by which the boundaries shall be marked out and on the limits of which shall be placed, besides the monuments, some fruit trees or useful forest trees.

Fourth. The land of which mention is made is of the extent of four square leagues, a little more or less, as explained by the map found in the expediente. The judge who gives the possession shall cause the same to be measured in accordance with the ordinances for the designation of boundaries, the surplus that may result to remain to the nation for its convenient uses.

Fifth. If they violate these conditions they shall lose their right to the land and it will be liable to be denounced by another.

78 In consequence whereof, I order that the present document serving them as a title and being held as firm and valid, registry be made thereof in the corresponding book, and that it be delivered to them for their security and further uses.

Given in Monterey on the 1st of October, 1834.

JOSE FIGUEROA.

AUGUSTIN V. ZAMORANO, *Sec'y.*

This title in relation to the adjudication of lands remains registered on folio 53, No. 51, on the book in the office under my charge in Monterey.

October 1st, 1834.

ZAMORANO.

Testimony of the Possession of Las Virgenes.

Year 1841.

In the pueblo of Los Angeles, on the 9th of June, 1835, in compliance with the solicitude of the Señores Don Domingo Carrillo and Don Nemecio Dominguez, asking that the corresponding possession be given them of the rancho called Las Virgenes, conceded to

79 them by the political government of this Territory, and the surveyor, Don Abel Stearns, having agreed to remeasure the said land, in strict accordance with the first measurements which had been made, the map of which is found in the expediente (proceedings), I shall go to the said place with my assisting witnesses and proceed to give the possession indicated, in accordance with the title or patent which has been conferred on the grantees by the government.

The citizen Francisco Javier Alvarado, 1st constitutional alcalde

of this pueblo, thus decreed, ordered, and signed, with the assisting witnesses, which I attest.

FRANCISCO JAVIER ALVARADO.

Assistant:
FRANCISCO ARZAGA.

Assistant:
RAFAEL GALLARDO.

On the rancho of Las Virgenes, on the 9th day of the month of June, 1835, I, the subscribing judge, having summoned the adjoining land-owners, and the mayordomo (superintendent) of the ex-mission of San Fernando, named Pedro Lopez, having appeared, together with Jacinto Lorenzana, part-owner of the rancho of Conejo, I informed them of the object of my visit to that place, requiring them to present the documents that they respectively
80 might have, or in any other manner set forth any right that they might have in the tract of land referred to, since I was going to remeasure and place in possession thereof Don Domingo Carrillo and Don Nemecio Dominguez; whereupon, no documents being presented by them nor any protests made requiring the measurement to be suspended, I told them that I was going to proceed to make the same; wherefore I make this entry in the proceedings, which I authorize and sign, with those of my assistants, according to law, which I attest.

FRANCISCO J. ALVARADO.

BASILIO VALDEZ.
RAFAEL GALLARDO.

On the rancho of Las Virgenes, on the 10th of June, 1835, I, the proper judge for the taking of these proceedings, appointed two official measurers and two cord-bearers, who, not being able to write their names, are not mentioned, to whom I made known their appointment, which they accepted, making oath that they would discharge their duties faithfully, which I authorized and signed, with my assistants, according to law.

FRANCISCO JAVIER ALVARADO.

BASILIO VALDEZ.
RAFAEL GALLARDO.

81 On the same day, month, and year, being at the place called "Chiquero Antiguo de las Boregas," which bounds with a sierra (mountain range) which divides the rancho from that of Don Tiburcio Tapia, for the purpose of measuring the lands belonging to the Señores Don Domingo Carrillo and Nemecio Dominguez and giving them possession of the same, the place being named Las Virgenes, all the necessary steps having been previously taken as required by law, the assisting witnesses, the cord-bearers, and the surveyor, Don Abel Stearns, being present, I caused a cord to be measured of the length of one hundred and thirty-five varas, which was examined by the said surveyor, each end of said cord being attached to a stake.

After the necessary observation and calculations had been made by the surveyor, by his direction the line was run to the foot of a small mountain, which was taken as the sign of a monument on the north; east ten degrees north, there were measured and counted 6,600 varas; whereupon the line was run south seventy degrees east, and in this direction was measured six thousand varas, the line terminating in a cañada close to a sierra, where a large live oak was made a landmark, from which was cut an arm or branch and which was also marked with a cross.

82 Continuing the measurement the line was run north eight thousand six hundred varas, the line terminating near the high road in the mouth of a cañada.

At this point the measurements were ordered to be suspended until the following day on account of the hour, the surveyor signing with me and the assisting witnesses.

FRANCISCO J. ALVARADO.

BACILIO VALDEZ.
RAFAEL GALLARDO.
ABEL STEARNS.

At the said place and in continuation of these proceedings, the assisting witnesses, the measurers, the cord-bearers, and the surveyor being present, by his direction the line was run north sixty-five degrees east, in which direction were measured and counted seven thousand two hundred varas; at the termination of which I ordered a sign to be placed for a monument.

Whereupon the line was run north, in which direction were measured and counted one thousand one hundred varas, the line terminating on the summit of a little hill, where a cross was

83 placed as a landmark, which was in the place which divides the lands measured from those of the ex-mission of San Fernando.

From this point the line was run west, in which direction were measured and counted nine thousand four hundred varas, the line terminating at the foot of a sierra where there is at present a sheep corral.

Continuing the measurements, the line was run to the south, in which direction were measured and counted four thousand one hundred varas, the line terminating at the foot of the sierra.

From this point the line was run to the west, in which direction were measured and counted eight thousand nine hundred varas, the line terminating at the foot of the sierra, where there is a cañada which divides this rancho from that of the Conejo.

In continuation of these measurements the line was run to the south, in which direction were measured and counted six thousand seven hundred and fifty varas, the line terminating at the point at which the measurements were commenced, which makes a corner to the northwest (the northwest corner of the tract surveyed).

Whereupon, the remeasurements of this place being con-

84 cluded to the satisfaction of the interested parties, I ordered them to cause the corresponding monuments to be placed at

the points indicated, which they understood; which I enter in the proceedings, which I authorize and sign with the surveyor and assisting witnesses.

FRANCISCO J. ALVARADO.

BACILIO VALDEZ.
RAFAEL GALLARDO.
ABEL STEARNS.

ANGELES, *June* 22*d*, 1835.

Let the testimony (certified copy) of these proceedings be given to the interested parties on common paper, for want of the corresponding stamped paper.

Francisco Javier Alvarado, constitutional alcalde of this pueblo and its jurisdiction, thus decreed, ordered, and signed before my assisting witnesses.

FRANCISCO J. ALVARADO.

BACILIO VALDEZ.
RAFAEL GALLARDO.

The foregoing agrees with the original from which it has been faithfully copied, compared, and corrected, which original exists in the book of public instruments of the year 1835, the
85 "testemonio" (copy) being made on seven folios of common paper, for want of the proper sealed paper, on this 24th day of September, 1841.

I, the second justice of the peace, attest.

IGNACIO MA. ALVARADO.

Assistant:
IGNACIO CORONEL.

Assistant:
CARLOS BARIC.

Fees, six dollars.

Whereupon defendants moved the court to strike out all of said evidence for the reasons specified in their objections hereinbefore made.

Motion denied. Defendants except.

Thereupon plaintiffs offered to read in evidence the deposition of José del Carmen Lugo.

Defendants objected on the ground that the same was incompetent and immaterial and because this claim of title had never been presented to the board of land commissioners.

Objection overruled and ruling duly excepted to by defendants.

Thereupon plaintiffs read the deposition of said José del Carmen Lugo as follows:

JOSÉ DEL CARMEN LUGO, called for plaintiffs, testified as fol-
86 lows:

My name is José del Carmen Lugo; 72 years of age. I have resided in Los Angeles and San Bernardino county. I know a place

in Los Angeles county called Las Virgenes. I first became acquainted with it in 1829. I knew Nemesio Dominguez and Domingo Carrillo. In 1834 I found Nemesio Dominguez living at Las Virgenes, in October of that year. He had stock cattle, oxen and horses, and he had a small house there and corrals. He established and founded the ranch that year. I used to see him there every time I went above (up country). I used to go about two or three times a year. He was there in 1835 and 1836.

Cross-examination:

Nemesio Dominguez was a married man at that time. His family was there with him. Before he went to Las Virgenes he lived here in Los Angeles with his family. In October, 1834, I found him at Las Virgenes; he had just gone there. I think that was the same year the land was ceded to him and Carrillo. Carrillo was not there. Nemesio Dominguez, in 1834, lived in an old-fashioned adobe house. I saw him living there in the house with his family until 1845. His stock was on the ranch when I saw him there in 1834. Nemesio Dominguez lived in this city on Main street, near the Celis
87 orchard, in 1833. I do not know if he planted any trees on the land. Carrillo did not live on the land. I am not related to the Dominguez family in any way. Dominguez, in 1834, was living on that part of Las Virgenes near the creek of that name, on the left-hand side of the road, on the further side of the creek. It had to be crossed in order to get to the house. Dominguez built three or four houses on Las Virgenes. The first house he built lay between the Arroyo de Las Virgenes and the place called "Cruz de Tapia;" the second house on this side of the creek down below. He occupied first the one and then the other with his family.

Plaintiffs then called W. P. REYNOLDS as a witness, who, being sworn, testified as follows:

My name is W. P. Reynolds; aged 63 years; residence, Los Angeles; occupation, surveyor and engineer; have been a surveyor 45 years; have been a deputy U. S. surveyor; have surveyed the Las Virgenes r'o by the act of juridical possession.

Defendants object to any evidence of the survey or any survey of this rancho as inadmissible because of the fact that the grant
88 has never been presented to the board of land commissioners; objection overruled and excepted to.

It was here stipulated that all objections of defendants as it applies to the testimony with reference to this grant may be considered as made and rulings thereon excepted to.

Witness continuing: At the time I made the survey of the grant I had the diseño and act of juridical possession as given to Nemesio Dominguez and Domingo Carrillo. I had certified copies of everything. I recognize these as the ones I used (here referring to Plaintiffs' Ex. A & B). The first survey I made was under the order of U. S. surveyor general, so as to locate two leagues. I had under-

stood from the papers which came down it was a 4-league. The second survey I made of the juridical possession, it was at the request of the owner to retrace the lines I originally ran. The survey was correct.. I found on that survey the natural objects. I found the place called "Chiquero Antiquo de los Borregas," adjoining the boundary line of the Conejo rancho, and another point marked "Hill" or "Little Ridge," and a large "live-oak tree" from which was cut an arm or branch and marked with a cross; found a little mound or hill with cross on it. This cross is now within the
89 patent lines of the San Fernando rancho, running thence west on the courses called for in the juridical possession. I did not find the remains of an old sheep corral. I found where they would naturally make a sheep corral. I made a map of that survey.

Q. Please look at this map and tell the court and jury what the purple lines on that map represent.

A. The purple lines represent the juridical possession as the natural objects are called for on the ground.

Q. The green lines represent what?

—. The purple lines were made by me because they connect with the natural objects called for in the juridical possession. I made these green lines on the map to see where Stearns' compass took him; according to the reading of his compass was one thing and the natural objects were another. I have surveyed many Mexican grants. My experience has been this: Their measurements are generally correct; just as correct as you can measure them with a chain, so far as distance was concerned.

Q. These surveys which you made, did you regard the true juridical possession the purple or the green lines?

90 Defendant objected on the ground that witness is asked for a mere opinion; objection overruled; exception.

A. I started at the natural objects, being connected one with another. I always took the natural objects and started courses and distances. Here witness shown Plaintiff's Exhibit "D," map, and testifies: That map of my survey is correct. Here the witness stated that the lands described in the complaint were within the juridical possession of the Rancho Las Virgenes as surveyed by him and delineated upon the map; that he made the survey and gave the field-notes to plaintiff's attorney, Robarts, in order to draw the complaint, and before I came in court to-day I examined the description in the complaint with the map so as to satisfy myself that it was within the boundaries of the juridical possession of the survey that was made by me and delineated in purple lines on that map.

Here it was admitted that the defendants were within the boundaries of the land described in the complaint.

Witness continues: I made also several other surveys of this grant for the Government, which are in the grant of 1837; that por-
91 tion now patented. When I was ordered to make the survey of the two leagues my instructions were to make a survey of

the whole ranch and return it to the office so as to see where the two leagues were situated from the juridical possession. As a matter of fact I made several surveys and afterwards surveyed it for private parties; am familiar with the whole grant; have studied these papers; had to study them over to be able to do so or survey it; made the first survey in 1874 and the last one about three years ago; the natural objects are still there; all my marks are there.

Plaintiff offered in evidence, in connection with testimony of Reynolds, the map he held in his hand.

Cross-examination:

I never made that map (Plaintiff's Exhibit D). I passed my field notes in to the map-maker and he made the map. I afterwards examined the field-notes and the map and found it correct. I can tell by looking at a map whether the angles and courses and distances are correct. When a map leaves my hands I know it is correct. Before that map left my hands I examined everything to see if it was right. I say that I can tell by looking at that map, which I never made, that the courses and distances are correct accord-
92 ing to my work. No man can tell that a map he did not make is correct without examining it. This map I had made under my directions, and before I received it I approved it. In 1874 I made the survey as United States deputy surveyor. I surveyed the whole juridical possession of that grant of four leagues. There is nothing in the diseño that indicated to me, independent of any other information I may have derived from hearsay or report, the point of beginning. My survey was based upon reports made to me under oath as to the points. I swore José Reyes and Pablo Reyes. They were interested parties. I made the survey in 1874 for the United States Government. I do not know whether that survey was approved or disapproved or withdrawn or not. I merely returned the survey. I do not know the lines of the patent. I think the lines of the patent are within the lines of this map, "Exhibit D." (Witness here describes on map, "Exhibit D.") The line of the patent commences in the cañada here (showing) and the lines meander down here to this point here (showing). I know from the fact that I have surveyed the whole country there and from that description. They took a starting point from one of my courses; that is the reason I know it. They take their starting point from one of my cor-
93 ners. It didn't take me a long time to find it. I retraced those lines, at the request of the owners of the ranch, about two years and a half ago. I have not been there since that survey. The cross is on a large live-oak tree in the arroyo of "El Triunfo," with a cross on the body of the tree about three or four feet from the surface of the ground. The tree is forty-two inches in diameter and can easily be distingushed very plainly; a person surveying there would naturally go to that tree. The cross is about three feet long perpendicularly; I do not know about the horizontal line; I never measured it; it was cut into the bark; the bark has grown over and shows the mark. The tree was alive when I saw it in

1874, and also in 1882; it was on the left bank of the "Arroyo del Triunfo." I do not recollect how far south it was from where I commenced surveying; I have it here on the map. I commenced surveying—I have it here on the map. I cannot tell you from recollection, because whatever I do I put down and exemplify on a map. Since I made that survey I have been surveying from British Columbia clear to Arizona. You cannot expect one to recollect the details of a survey. When I made the survey in 1874 I separated two leagues from the survey as near as I could. I
94 placed it on the east of the present patent. I made a survey of this identical land after the patent was issued. Part of the land covered by the juridical possession is covered by the patent; part of it run into another ranch. I had to square my work according to the lines that had formerly been patented. I made this second survey for Miguel Leonis; he paid. I merely retraced the lines of the former survey I made. I placed it, according to my survey of 1874, on the east of the patent lines. I never saw the patent. I merely followed my instructions. The reason that in 1874 I placed my survey east of the Cruiz de Tapia was because the decree of the court said it went there; such were my instructions from the surveyor general. He said I was correct and the Commissioner of the General Land Office said I was not.

I made a survey of the juridical possession of the grant made by Juan B. Alvarado in 1837; I had instructions so to do. I had all the papers connected with it, and if you will watch closely these two juridical possessions you will see they all come to the same points; they start from one point.

Redirect:

The juridical possessions of 1835 includes also the land
95 given in the possession of 1837. In other words, the two leagues granted in 1837 by Juan B. Alvarado to Jose Maria Dominguez is included and embraced within the exterior lines of the juridical possession of 1835 of the grant to Nemesio Dominguez and Domingo Carrillo; the dividing line between the two leagues is the Cruz de Tapia; that was my starting point in making the survey of the two leagues.

Q. You were asked if you had anything by which you could get a starting point in making the survey.

A. In making the survey of the juridical possession I had to call in testimony which we were instructed to and obliged to do.

Q. Did you not have at the time you made that survey of the juridical possession—did you not have the established line of the Conejo rancho at your service?

A. Yes, sir.

Q. Did you not have also the line of what is called the San Fernando rancho?

A. Yes, sir.

Q. Could you not, by starting at a given point, run out the lines of the juridical possession as called for in this espediente?

A. Yes, sir; having a starting point, I can find any point that is called for.

96 Plaintiff now offers in evidence the map, Plaintiff's "Exhibit D."

(Here follows photograph marked p. 96.)

Objected to on the ground that Mr. Reynolds has not laid a foundation to justify it as an accurate map, for he did not make it, and if I do not misunderstand his evidence he could not, from inspection, know that these lines on it were true and coerrect according to the survey on the ground and the field-notes. Neither having made the map himself nor being able so to testify, it is not made out sufficiently accurate as to be regarded as testimony in the case.

Objection overruled, defendants excepting to such ruling.

Explanatory of Foregoing Map.

1st. The small line, with course and distance marked on each course, is the green line referred to in W. P. Reynolds' evidence, being the line of the juridical possession.

2d. The larger line is the one by Mr. Reynolds called the purple line, whereon he states he placed the lines of the grant and found the objects mentioned in the juridical possession.

3d. The red mark across the purple lines indicates the place of the patent line under the two-league confimation under the Juan Alvarado grant of 1837, lying west of the red marks.

97 Here plaintiff offered to read in evidence page 25, recorded in Book 4 of Deeds, page 398, together with a translation of the same, purporting to be a deed of conveyance from Nemesio Dominguez and Simona Villa de Dominquez, his wife, to their son, Apolonio Dominquez, the father of the present plaintiff, dated April 6, 1859.

Defendants objected as heretofore, and for the same reasons, that the same was incompetent, irrelevant and immaterial.

Objection overruled. Defendants except.

JOHN ROBARTS, sworn for plaintiff, testified—

That he was acquainted with Nemesio Dominguez in his lifetime; that he was sometimes called Demesio and sometimes Nemesio, and his name is signed Demesio and Nemesio, as appears by the archives of this city. He could not write. Whenever his name was written he signed with a cross. He was known as well by one name as another.

The said deed read in evidence, purporting to quitclaim all the right, title, and interest of Nemesio and wife in and to said rancho to Apolonio Dominguez is as follows:

Sea notorio á todos los que las presentes vieren y entendieren como nosotros, Demecio Dominguez y Simona Villa, hemos
98 vendido por la consideracion de seiscientos pesos $600 á nuestro hijo Apolonio Dominguez todo el derecho que tenemos ó podemos tener en la mitad del rancho conocido con el nombre de "Las Virgenes," situado en el condado de Los Angeles, colindante con los parajes siguientes: "Sierra de Maligo; Rancho del Triunfo; Rancho del Escorpion" y terreno de San Fernando, la mitad que por este instrumento tra-pasamos á nuestro hijo Apolonio Dominguez se halla comprendida entre los limites siguientes, la Cruz de Tapia, Las Calabazas, la Sierra de Maligo, y "El Escorpion," y por estas presentes le trasferimos todo el derecho que nos confiere el titulo del gobierno Mejicano al mencionado terreno como asi mismo el derecho de ocupacion que en el tenemos, de to lo cual y en consideracion de los referidos seiscientos pesos $600, lo reconocemos como el unico dueño de los terrenos ya citados; y para los usos que á el convengan le damos el presente instrumento otorgado en la Ciudad de Santa Barbara, Condado del mismo nombre, en el estado de California, hoy dia seis de Abril, A. D. 1859, y pusimos nuestras manos y sellos.

su
SIMONA x VILLA. [SEAL.]
marca.

su
DEMECIO x DOMINGUEZ. [SEAL.]
marca.

Testigo:
ANTONIO DE LA PALMA Y MESA.

99 Duly acknowledged and recorded in recorder's office, Los Angeles, on 14 April, 1859.

Endorsed: Plaintiff's Exhibit E.

A translation of which is as follows:

Be it known to all whom these presents should come and be understood that we, Demecio Dominguez and Simona Villa, have sold to our son, Apolonio Dominguez, for the consideration of six hundred dollars, all the right that we have or may have in the one-half of the rancho known by the name of "Las Virgenes," situate in the county of Los Angeles and bounded by the following tracts of land: "The Maligo Mountains, the Triunfo rancho, the Rancho Escorpion," and the lands of San Fernando. The half that by this instrument we convey to our son Apolonio Dominguez is contained within the following limits: The Tapia Cross, the Calabazas, the Maligo Mountains, and the Escorpion, and by these presents we transfer to him all the right and interest which the title from the Mexican nation confers on us to the hereinbefore-mentioned land, as also our right of possession thereof, and in consideration of the said sum of $600 we recognize him as the sole owner of the said lands, and for the
100 purposes most convenient to him we give him this instrument, acknowledged in the city of Santa Barbara, county of

the same name, in the State of California, this 6th day of April 1859, and to which we set our hands and seals.

her
SIMONA xVILLA. [SEAL.]
mark.
his
DEMECIO x DOMINGUEZ. [SEAL.]
mark.

Witness:
ANTONIO DE LA PALMA Y MESA.

Plaintiff next offered to read in evidence petition for letters testamentary on the estate of Apolonio Dominquez and letters of administration on the estate of Merced L. Dominguez, deceased, his widow, and the proceedings had therein. Whereupon it was stipulated (subject to the right of counsel for defendants to object to relevancy, materiality, and competency of such evidence and the right to move to strike out the same) that Apolonio Dominguez died testate, devising all his property to his widow and children in equal shares, and that such will was admitted to probate; that Merced L. Dominguez, his widow, died intestate, and that letters of administration have been issued on her estate; that the inventory and appraisement of
101 the estate of Apolonio Dominguez shows that the Rho. Las Virgenes was part and parcel of the property inventoried as his estate.

Objected to by the counsel for the defendants on the grounds that the same and the whole are irrelevant, immaterial, and incompetent, for the reason that the said lands have not been shown to have been presented to the U. S. board of land commissioners, and objection overruled. Defendants except.

And on the same grounds defendants move to strike out all the foregoing evidence.

Motion denied. Defendants except.

Plaintiff then proved by the evidence of Refugio Dominguez Reyes, José Dominguez, Francisco Dominguez, and the plaintiff that they are respectively 37, 43, 34, and 25 years of age, all children of Apolonio Dominguez, deceased, and grandchildren of Nemesio Dominguez, the grantee named in the expediente, and all born on the Rancho Las Virgenes, and all excepting Refugio de Reyes having lived and now living on the rancho all their lives; that plaintiff is a child and heir-at-law and devisee under the will of Apolonio Dominguez, deceased, and as such succeeded to whatever title he had to the lands in question in the proportion of one-seventh thereof; that their father lived on said rancho up to the time of
102 his death and was living there since they could first remember; that he had improvements there—a house; that he had horses and cattle on the land; cultivated it and rented a portion of it and did so all the time he lived there; that they and their brothers and sisters have, since their father's death, resided there, cultivating it, occupying it with cattle and horses and some sheep, cutting timber thereon; that there was a small orchard planted in front of

the house occupied by their father; that their grandfather's house and their father's house was one and the same; that their father rented the ranch for cattle and sheep pasture; that the several tracts occupied by the defendants are portions of the Rancho Las Virgenes; that their father when alive would show them the lines of the grant; that he used to claim the land from the Conejo rancho to the San Fernando rancho; that his stock during his lifetime and theirs since his death pastured and ran on the lands now occupied by defendants; that the defendants prevented plaintiff from using or improving or occupying the lands so occupied by them and would catch their stock so pasturing on the lands in controversy and shut it up.

Miguel Leonis also testified to the same facts.

103 And subject to the objection as to the competency, relevancy, and admissibility of such evidence, and reserving the right to move to strike the same out upon the grounds and reasons hereinafter mentioned.

Here plaintiff rests.

Defendants thereupon moved the court to strike out all the evidence which had been given on the part of the plaintiff in this case, on the ground that it is inadmissible, immaterial, irrelevant, and incompetent, for the reason that the plaintiff has closed the case, and there is no evidence appearing that the grant claiming to be a Mexican grant was ever presented to the board of land commissioners for the settlement of land titles in California under the act of Congress dated March 3d, 1851, and, secondly, for the reason that the alleged title is not a legal title, but at most an equitable title.

Motion to strike out denied. Exception by defendants noted.

Defendants then moved for a nonsuit on the same grounds above set forth on motion to strike out, which motion was then and there by the court denied and an exception by defendants taken.

Defendants then offered to introduce in evidence a duly

104 certified copy from the U. S. district court of this State, a transcript of all the proceedings before the board of land commissioners under act of Congress of March 3, 1851 (in case No. 256, as marked on the document), for the purpose of showing the presentation, the identical same expediente, including all the papers and documents therein, which have been heretofore read by the plaintiff as evidence in this action, for the purpose of proving that this alleged grant to Domingo Carrillo and Nemecio Dominguez was presented to the board of land commissioners, as also to show the decision of said board rejecting the same and the reasons therefor; and also that an appeal was taken from that decision to the U. S. district court of California by the claimant and its decision and the dismissal of said appeal for want of prosecution; the petition of the claimants for the approval of the grant, and the reasons

assigned for its rejection; which document was inspected by the court, namely:

Transcript of the Proceedings in Case No. 508.

THE HEIRS OF DOMINGO CARRILLO, Claimants,

vs.

THE UNITED STATES, Defendants.

For the place named "Las Virgenes."

105 Petition.

To the honorable commissioners to settle private land claims in California:

The petitioners, Concepcion Pico de Carrillo, widow, Joaquin Carrillo, José Antonio Carrillo, Maria Carrillo, Francisco Carrillo, Alexander Carrillo, and Rita Carrillo, children of Domingo Carrillo, deceased, respectfully show—

That on the 1st day of October, 1834, José Figueroa, Governor of California, by virtue of authority in him vested, granted to Domingo Carrillo and Nemesio Dominguez the tract of land called Las Virgenes, in the former district of Los Angeles, containing four square leagues, a little more or less, as described in the grant and accompanying map, as is fully shown in the original expediente, No. 54, now in the archives in charge of the surveyor general, and which is hereby referred to as Exhibit "A," a translation of which will be submitted to this board and marked Exhibit "B."

That said grant was duly approved by the departmental assembly August 29th, A. D. 1835, as shown in the expediente above referred to.

That said tract was duly surveyed and the judicial possession of it given to the grantees on the 10th day of June, A. D. 1835,
106 a duly authenticated copy of which act of possession is submitted herewith, marked "C," with a translation, marked "D."

That in the year 1837 the said Domingo Carrillo died in California, leaving these petitioners his heirs and legal representatives.

That the petitioners and those under whom they held have been for eighteen years in possession and occupation of the said tract of land.

That they know of no conflicting claim.

That they rely for confirmation of title upon the original papers submitted herewith and referred to in this petition, upon the records in the archives of the former government, now in the hands of the surveyor general, and upon such other and further proofs as they may be advised are necessary.

Wherefore they pray the commissioners to confirm to them one-half of the aforesaid tract of land called "Las Virgenes," and duly described in the papers here referred to.

By their attorneys, HALLECK, PEACHY & BILLINGS.

Filed in office June 6th, 1853.

GEORGE FISHER, *Secretary.*

Recorded in volume first of petitions, pages 476 and 477.
GEORGE FISHER, *Secretary.*

107 *Opinion of the Board.*

HEIRS OF DOMINGO CARRILO *vs.* THE UNITED STATES.

For the undivided half two square leagues of the place called Las Virgenes, in Santa Barbara county.

The petitioners are proved to be the widow and children of Domingo Carrillo, who died in 1837, and from whom they claim title by inheritance. They allege that a grant of the land was made to said Domingo Carrillo and Nemecio Dominguez by General Figueroa on the first day of October, 1834.

The loss of the grant is shown by the affidavit of one of the present claimants, and a traced copy from the book of titles in the archives, duly certified by the surveyor general, is presented.

This is derived from the legitimate source—the official book of records—and is entitled to be regarded as a true copy of the original. Judicial possession was given under the grant June 10th, 1835.

The grant required the grantees to build a house on the premises within a year, and that the same should be inhabited. There
108 is no evidence that this condition was complied with, and the proof is not sufficient to show a performance of the usual conditions of settlements or cultivation within a reasonable time after the concession was made.

No part of the premises are shown to have been cultivated. Carrillo never lived on the place, and although it is stated that Dominguez, the other grantee, did live on the place with his family it was very long after the lapse of time contemplated by the law for the performance of the conditions.

We think the testimony insufficient to entitle the representatives of said Carrillo to a perfection of the title of the land. In case No. 344, which has just been adjudicated, the land claimed in this case has been confirmed to Maria Antonia Machado.

The expediente in that case contains a relinquishment on the part of said Domingo Carrillo of his interest in the Rancho Las Virgenes to José Maria Dominguez, dated February 16th, 1837, and on the sixth day of the month succeeding a grant was issued to the latter, who subsequently conveyed to Machado. The conveyance from Carrillo to said Dominguez is not introduced as evidence in this case, and we do not therefore put the rejection of the claims on that ground. The want of proof of settlement or cultivation
109 within the meaning of the law is fatal to the claim, and the proceedings before the Governor when the subsequent grant was made to José Maria Dominguez shows him entirely in conformity with justice — is a determination of this case.

By a decree adverse to an interest which had been evidently re-

garded of so little value by the ancestor of the claimant as to be given away to another a decree of rejection will be entered.

Rejected.

Filed in office November 7th, 1854.

GEORGE FISHER, *Sec'y.*

Decree.

HEIRS OF DOMINGO CARRILLO
vs.
THE UNITED STATES. } Number 508.

In this case, on hearing the proofs and allegations, it is adjudged by the commissioners that the claim of the said petitioners is
110 not valid, and it is therefore decreed that their application for a confirmation thereof be therefore denied.

ALPHEUS FITCH,
M. AUG. THOMPSON,
S. B. FARWELL,
Commissioners.

Filed in office Nov. 7, 1854

GEORGE FISHER, *Secretary.*

And it appearing to the satisfaction of this board that the land hereby adjudicated is situated in the southern district of California, it is hereby ordered that two transcripts of the proceedings of the decision in this case and of the papers and evidence upon which the same are founded be made and duly certified by the secretary, one of which transcripts shall be filed with the clerk of the United States district court for the southern district of California and the other be transmitted to the Attorney General of the United States.

111 M. MERCED LUGO DE FOSTIR, Appellants,
vs.
THE UNITED STATES, Appellees. } No. 116.

MICHAEL WHITE, Appellant,
vs.
THE UNITED STATES, Appellees. } No. 138.

HEIRS OF DOMINGO CARRILLO, Appellants,
vs.
THE UNITED STATES, Appellees. } No. "256."

Now, on this day, on motion of J. R. Gitchell, Esq., U. S. district attorney, it is ordered by the court that the four above-mentioned cases be passed informally.

WEDNESDAY, 7*th March*, 1860.

Court met pursuant to adjournment.

Present: Hon. I. S. K. Ogier, judge.

Now, on this day, the motion heretofore filed in cases num-
112 bered on the docket of this court Nos. 131, 74, 116, 138, 96, "256," and 278, asking the court to dismiss them on account of failure to prosecute the appeal on the part of the claimants, is by the court granted, and it is ordered that the appeal in said cases be, and they are hereby, dismissed.

I, Southard Hoffman, clerk of the district court of the United States for the district of California, do hereby certify the foregoing and hereunto-annexed pages to contain a full, true, and correct transcript of the record in the case "The United States *vs.* The Heirs of Domingo Carrillo," land case No. 256, southern district, now remaining on file and of record in my office.

Attest my hand and the seal of said district court, at San Francisco, Cal., this 2nd day of April, 1881.

[SEAL.] SOUTHARD HOFFMAM, *Clerk*,
By N. D. GRIMWOOD, *Deputy Clerk*.

To all of which the plaintiffs objected on the ground—

First. That the petition was on behalf of the heirs of Domingo Carrillo only, and that Nemesio Dominguez and his heirs had not joined.

113 Second. That the petition was for confirmation of two square leagues, being an undivided half belonging to Domingo Carrillo, the cograntee of Nemesio Dominguez.

Third. That the decision of the board of land commissioners in this case does not show nor mention the names of the heirs of Nemesio Dominguez or Nemesio himself.

Fourth. Because the decision was based upon the ground that Domingo Carrillo did not comply with the conditions of the grant in building a house upon it.

Fifth. That in no way or manner does it affect Nemesio or his heirs, they not being party to the proceedings in any way, shape, or manner.

Objections sustained and defendantt except.

Defendants then introduced JOSÉ DEL CARMEN DOMINGUEZ, who testified as follows:

I am a son of Nemesio Dominguez—a legitimate son. I knew Domingo Carrillo in his lifetime very well. I am about 63 years of age. I was married in 1844, on the Las Virgenes rancho. I know the year my father first went to the Las Virgenes
114 rancho. We commenced to occupy it in 1836; in February we took possession. In 1836 my father moved from the De Celis vineyard, in this city. Previous to that time my father had no building or house on the ranch. When we arrived there, in the month of February, there were a lot of people with us. We had our stock and everything. We built a house with poles and sticks.

That was the first house built on the ranch, when we took possession. That was the first time the stock had been taken there—family, stock, and everything. My father left the land in 1849 and went to Santa Barbara. He never moved back to occupy the land after that; he passed the possession over to us. Since the year 1850 my brother and I have had possession of it.

Q. Do you know whether your father knew that Carrillo had presented a petition to the board of land commissioners for that title?

To which plaintiff objected on the grounds that the same is incompetent and immaterial and not proper evidence.

Objection sustained and defendants except.

Cross-examination:

Before my father went to the Las Virgenes rancho he lived in this city, on the De Celis place. He kept his stock on the La Brea
115 ranch. He had a partner on the La Brea rancho named Rocha. They had a square league or two. When we went to the Las Virgenes rancho, in 1836, my brother was along. I know a man named Salvador Garcia; he went with us in 1836; he is dead now. I have four sons living; had five; one is dead; four boys and one girl living. Two of those sons are defendants in this action.

Q. You are interested in the result of this action, are you not? You live with them?

A. Yes, sir. Naturally I would have an interest in their part.

Q. During Apolonio's life you and he were always quarreling about the ownership of the ranch; he claimed the whole and you one-half?

A. Yes, sir; I claimed one-half. Since his death I have been claiming it; always had my possession there, which I recognize; always claimed to be the owner of half, but they have not recognized me.

As an heir I have always recognized myself to own one-half, but they, the children of Polonio, have not recognized me. I have two of my sons on a portion of the Las Virgenes ranch, occupying it for me, Jose Fernando and Jose Casimiro Dominguez.

116 Q. They are occupying the lands as tenants under you and you claim one-half of the rancho, and they are claiming it as squatters?

A. Myself not being there at the ranch—being off above—they tried to turn them out on the street, and they thought they could claim it as squatters.

Q. Where was that log house made of poles?

A. Where Felipe Botiller is now, on the top of the knoll. He is one of the defendants. I know José del Carmen Lugo; have seen him on the ranch; came there on a visit when he was going to Santa Barbara; he stopped at my father's house; they were friends; he might have stopped several times; I do not recollect. When he first stopped at my father's on the rancho was a good while ago. He went there first when we wanted to make some grain measures;

some time about the year 1836; I cannot recollect very well now the date or how long it was after my father went to the Las Virgenes ranch that I saw José del Carmen Lugo the first time. I know José Maria Abila. My father used to make cart wheels, and he (A.) used to make wheels for him. He had them for sale. I saw Abila at my father's to get some ox-cart wheels about the year 1837. I am sure of that.

117 Q. Are you as sure of that as of anything else you have said to-day?

A. I am not as sure of it exactly; but what I know, my father had an American there making carts about the year 1837, and Abila was there at that time.

It was admitted by plaintiff that each of the defendants would swear that he or she was a citizen of the United States, or had declared his or her intention to become such.

DOMINGUEZ *vs.* BOTILLER *et als.*

The court gives you the following instructions:

First. It is made my duty to construe the written instruments received in evidence in this case and to declare their legal effect. I therefore instruct you that the documents, Plaintiff's Exhibits A and B, and the acts evidenced thereby under the Mexican law in force at the time they were made, constituted a perfect grant and operated to vest in the grantees therein named all the right, title, and

118 interest of the Mexican Government. They vested as much title under the laws of Mexico in the grantee as does a patent from the United States to the patentee under our system of government.

Given. A. Brunson, judge.

Second. The title to the land by grant from Mexico, being perfect at the time of the acquistion of California by the United States, the grantee was not compelled to submit the same for confirmation to the board of commissioners established by the act of Congress of March 3rd, 1851, nor did the grantee, Nemecio Dominguez, forfeit the land described in the grant by a failure to present his claim for confirmation before said board of commissioners, and the title so acquired by the grantee may be asserted by him or his successor in interest in the courts of this country.

Given. A. Brunson, judge.

Third. The grant being perfect, the Republic of Mexico, at the date of the treaty of Guadalupe Hidalgo and the cession of California to the United States, had no interest or title to the lands within the grant and the United States acquired no title to said lands by said cession.

Given. A Brunson, judge.

119 Fourth. Under the terms and conditions of said treaty of Guadalupe Hidalgo the title to Nemesio Dominguez was in no respect impaired by that treaty of cession, but under that treaty

said grantee is entitled to be protected by the United States in the enjoyment of the property in said grant described.

Given. A. Brunson, judge.

Fifth. The court instructs you that the conditions specified in said concession as to building a house and planting an orchard were conditions subsequent, which did not prevent the estate from becoming vested that very instant with the delivery of the grant, and for a non-compliance with which the estate could only be divested, if at all, but by the action of the Mexican Government.

Given. A. Brunson, judge.

Sixth. The court instructs you that whether the premises in controversy in this suit are included within the grant is a question of fact for you to determine; and if you find from the evidence that the lands sued for are within the grant, and that the plaintiff herein has succeeded to an undivided interest in said lands by conveyance and inheritance, then you will find for the plaintiff.

Given. A. Brunson, judge.

120 Seventh. The court instructs you that plaintiff in open court has for the purpose of this trial abandoned all claim to damages by reason of defendants' possession, and the question of damages is not before you.

Given. A. Brunson, judge.

Filed May 6th, 1885.

C. H. DUNSMOOR, *Clerk.*

The defendants request the court to instruct the jury—

First. That if the jury find from the evidence that the land described in the complaint in this action was a Mexican grant, before the plaintiff can recover it under a claim of title the jury must be convinced from the evidence that it was presented to the board of land commissioners organized to settle private land claims in California under the act of Congress of March 3rd, 1851, and the acts amendatory thereto; and if they find it was not so presented they should find for defendants.

Refused. A. Brunson, judge.

121 Second. That the jury are further instructed that if you believe from the evidence that the land described in the complaint was a Mexican grant, and that this alleged grant was presented to the board of land commissioners, and that the same was rejected by it and was never confirmed, then your verdict should be for the defendants.

Refused. A. Brunson, judge.

The court further instructs the jury that no recovery by the plaintiff can be had in this action based upon mere possession, exclusive of title, unless you believe from the evidence at the date of the alleged wrongful entry upon the several and respective tracts occupied by the defendants the plaintiff then had actual and not constructive possession of such tracts.

Given. A. Brunson, judge.

To each instruction severally so given by the court for the plaintiff the defendants at the time duly excepted.

And to the refusal of the court to give the instructions requested by the defendants, the defendants likewise excepted at the time.

Whereupon the jury retired, and afterwards returned into court and delivered their verdict for the plaintiff, on the 6th day of May, 1885:

122 (Title of court and cause.)

In the above-entitled cause we, the jury, find for the plaintiff.
May 6, 1885.

JOHN P. MORAN, *Foreman.*

And afterwards, on the 7th day of May, 1885, judgment on said verdict was duly made and entered.

See judgment-roll, *ante.*

And afterwards, on the 16th day of May, 1885, the defendants duly served and filed their notice of intention to move for a new trial herein as follows, to wit:

Notice of Intention to Move for New Trial.

(Title of court and cause.)

Please take notice that the above-named defendants intend to move the court to set aside and vacate the verdict and judgment heretofore rendered and entered herein and to grant a new trial in this case upon the following grounds, viz:

1st. Because — newly discovered evidence, material for defendants, which they could not with reasonable diligence have discovered and produced at the trial.

123 2d. Insufficiency of the evidence to justify the verdict and judgment.

3d. Errors in law occurring at the trial and excepted to by the parties making the application.

4th. Because the verdict and judgment is against the law.

5th. Because the verdict and judgment is contrary to the evidence.

The said motion will be made upon the files and pleadings in the case, on affidavits of newly discovered evidence, and upon a statement of the case hereafter to be prepared, made, served, settled, and filed.

May 16th, 1885.

H. K. S. O'MELVENY,
Attorney for Defendants.

To Howard & Robarts, attorneys for plaintiff.

Errors.

The defendants make the following specification of errors occurring at the trial and assign for errors that—

First. The court erred in admitting in evidence (against
124 the objections of defendants) the alleged expediente of the so-called grant Las Virgenes, because the same was incompetent and inadmissible to prove legal title to said land, for the reason (1) it was not shown that said claim to said grant had ever been presented to the U. S. board of land commissioners under the act of Congress of March 3rd, 1851; (2) because original petition, diseño, and alleged instrument of grant fail to describe any land with common certainty, and the same are void for uncertainty; (3) because the place called Las Virgenes was at the time claimed by and in the possession of the mission fathers of San Fernando mission, and was therefore not the subject of grant by the governor under the laws of Mexico, and the judicial power assumed by the governor to decide *ex parte* the right of the mission fathers was unauthorized.

Second. The court erred in admitting in evidence the alleged instrument of concession or grant of Oct. 1st, 1834, for the reasons specified in the foregoing error No. 1; and, further, because it was made *and* upon the conditions therein set forth, and more especially upon the conditions precedent, that it be approved by the supreme government of Mexico, and subject to forfeiture and denouncement if
no house was built upon it, habitable, within one year at most
125 from its date, and because *of* the other conditions set out in said alleged grant were not proven to have been performed.

Third. The court further erred in admitting in evidence said expediente documents and the translation thereof, because the governor (Figueroa) exceeded his authority in this. That at most he had power only to grant the land asked for in written petitions of applicants, and no other or different. The petition of Carrillo and Dominguez asked only for the place called Las Virgenes, 1½ by ¾ of a league, and the alleged grant of 4 leagues in that petition was void as to the excess of more than two leagues.

Fourth. The court erred in admitting in evidence the document called the juridical possession (1) because it was made prior to any approval of the alleged grant, and (2) its lines embrace more than 4 leagues, and embrace parts of San Fernando, Simi, and El Conejo grants.

Fifth. The court erred in denying defendants' motion to strike out all expediente documents and translation thereof for the reasons and on the grounds alleged at the time of the trial, which are specified in the foregoing specification of errors (Nos. 1, 2, 3, and 4).

126 Sixth. The court erred in admitting in evidence the evidence of José del Carmen Lugo because (1) the same was incompetent and irrelevant, for the reason that the alleged grant was not shown to have ever been presented to said board of land commissioners, and was extinct as evidence for any purpose; (2) because plaintiff based her claim solely on said alleged grant as her title, and to no other source.

Seventh. The court erred in admitting the testimony of Wm. P. Reynolds for the same reasons and grounds alleged as objections to the evidence of José del Carmen Lugo in specification of errer (No. 6) above.

Eighth. The court erred in admitting the deed of Nemesio Dominguez to Apolonio Dominguez, purporting to convey by quitclaim this land to Apolonio, dated April 6th, 1859, for the same reasons and objections urged to the evidence of Lugo and Reynolds in errors 5 and 6 herein.

Ninth. The court erred in denying defendants' motion to strike out all and every part of the plaintiff's evidence in this action, made at the close of the plaintiff's evidence, on the ground that the same and every part thereof was inadmissible and incompe-
127 tent to prove the issue of title made in the pleadings, for the reason that all of said evidence and documents related to an alleged Mexican grant which was admitted by plaintiff had never been presented to the board of land commissioners for California under the act of Congress March 3d, 1851; (2) because said alleged title is on its face not a legal title, but at most a mere equitable title.

Tenth. The court likewise erred in denying the defendants' motion for nonsuit, which was based upon the same grounds and reasons set forth as objections to the evidence in error No. 9 (above) herein.

Eleventh. The court erred in refusing to admit in evidence on the part of defendants a duly certified transcript of the United States district court of the proceedings before the said board of land commissioners of said United States district court under the act of Congress of 1851 in case marked "256," for the purpose of proving the presentation of the identical same claim and espediente, including all papers and documents therein which the plaintiff had hereinbefore read in evidence in this case, and that this alleged grant to Domingo Carrillo and Nemecio Dominguez was presented to said board of land commissioners; and also to show that by the decision
128 of the said board this grant was rejected and the reasons therefor; and, further, that an appeal from said decision of said board — to the United States district court in California, and its final decision — thereon dismissing said appeal for want of prosecution.

Twelfth. The court erred in sustaining the plaintiff's objection to the evidence of the defendants, and refusing to permit defendants' witness, José del Carmen Dominguez, to answer the question whether his father, Nemecio Dominguez, did not know that this claim had been presented to the board of land commissioners by Carrillo.

Thirteenth. The court erred in giving instructions Nos. 1, 2, 3, 4, 5, and 6, and each separately, for the reason (1) the same and each one is contrary to law; (2) because each and every of said instructions are argumentative; (3) because each and every one of said instructions are contrary to the evidence, because by the evidence the grant alleged is void for uncertainty in the want of description of the land, and because the alleged grant was not on its face a perfect title, and was a claim requiring submission to said board before it could be considered a perfect title.

Fourteenth. The court erred in refusing to give instruc-
129 tion (1) required for defendants, because the same was considered with the evidence and is law.

Fifteenth. The court erred in the judgment as rendered and entered in this: That defendants disclaimed to all land except that described in the answer and no other or different land, and the judgment is for the recovery against them of at least 2,000 acres of land to which they set up no claim and actually disclaimed. Wherefore defendants ask that said verdict and judgment may be vacated and a new trial granted to defendants.

June 25th, 1885.

H. K. S. O'MELVENY,
Attorney for Defendants.

By the order of the court and by stipulation by the plaintiff and defendants the time within which to prepare statement on motion for new trial and within which to prepare amendments by the plaintiff thereto was by stipulation extended up to September 8th, 1885; that the statement on motion for new trial was served by defendants on plaintiff's counsel June 25th, 1885, and plaintiff's amendments thereto were served and agreed upon by de-
130 fendants' counsel September 8th, 1885, and all objections as to lapse of statutory time wherein to prepare statement and amendments thereto and settle the same — waived.

H. K. S. O'MELVENY,
Attorney for Defendants.
HOWARD & ROBARTS AND
A. L. RHODES,
Attorneys for Plaintiff.

We, the attorneys for the plaintiff and attorney for defendants, do hereby certify that the foregoing statement on motion for a new trial in the said action of Domingo Dominguez, plaintiff, and Brigido Botiller *et al.*, defendants, is true and correct, and that the transcript herein is a true copy of the original judgment-roll and pleadings and files in said action.

September 8th, 1885.

H. K. S. O'MELVENY,
Attorney for Defendants.
HOWARD & ROBARTS AND
A. L. RHODES,
Attorneys for Plaintiff.

131 Superior Court, Los Angeles Co., Cal.

The foregoing statement on motion for new trial is hereby settled, allowed, approved, and is correct.

Sept. 11th, 1885.

A. BRUNSON,
Judge Superior Court.

Received the within statement on motion for new trial June 25, 1885.

HOWARD & ROBARTS AND
A. L. RHODES,
Attorneys for Plaintiff.

Filed September 11, 1885.

CHARLES H. DUNSMOOR, *Clerk*,
By A. N. HAMILTON, *Deputy*.

Minutes of Court.

DOMINGO DOMINGUEZ
vs.
BRIGIDO BOTILLER. } No. 2915.

SEPTEMBER 11, 1885.

Motion for new trial submitted and said motion denied. Exceptions.

132 *Notice of Appeal.*

In the Superior Court of the State of California within and for the County of Los Angeles.

DOMINGA DOMINGUEZ, Plaintiff,
vs.
BRIGIDO BOTILLER *et al.*, Defendants. } No. 2915.

You will please take notice that the defendants, Brigido Botiller, Tadeo Botiller, Felipe Botiller, Eduardo Stokes, Loreto Robles, Sr., Loreto Robles, Jr., Jose Maria Leon, Antonio Tapia, Fernando Dominguez, Jose Casimiro Dominguez, Guadalupe Rocha, Francisco A. Reyes, Miguel Souers, Trinidad Higuera, Bernardo Selaya, Roman Valdez, and Joseph Robinson, in said action hereby appeal to the supreme court of the State of California from the judgment of said superior court entered in said action against them and in favor of the said plaintiff on the 7th day of May, 1885, and from the whole thereof.

And also that the above-named defendants in said action have and do hereby appeal to said supreme court of said State from the order and judgment of said superior court made and entered in said action in favor of said plaintiff and against the said defend-
133 ants on the 11th day of September, 1885, denying the above-named defendants' motion for a new trial and from the whole thereof.

Dated this 2nd day of November, 1885.

H. K. S. O'MELVENY,
Attorney for Defendants.

To the clerk of said court and to Messrs. Howard & Robarts, attorneys of plaintiff, and A. L. Rhodes, of counsel.

Filed Nov. 2d, 1885.

CHAS. H. DUNSMOOR, *Clerk*,
By L. J. THOMPSON, *Deputy*.

We do hereby accept and acknowledge service of the within notice of appeal to the supreme court, 2d Nov., 1885, and waive copy

HOWARD & ROBARTS AND
A. L. RHODES,
Attorneys for Plaintiff.

134 *Certificate of Transcript, etc.*

STATE OF CALIFORNIA, } ss:
Los Angeles County, }

In the Superior Court of the State of California within and for Los Angeles County.

DOMINGA DOMINGUEZ, Plaintiff,
vs.
BRIGADO BOTELLER *et al.*, Defendants. } No. 2915.

J. G. Howard and John Robarts, attorneys for the plaintiff, and H. K. S. O'Melveny, attorney for the defendants in the above-entitled action, do hereby certify that the foregoing is a full, true, and correct transcript of the complaint, demurrer, order denying demurrer to the complaint, exceptions thereto, answer of the said defendants, rulings of the court on the trial and exceptions thereto, instructions of the court and exceptions thereto at the time, verdict of the jury and the judgment of the court thereon, notice of motion of intention to move for a new trial, statement of the case on motion for new trial, and order settling and allowing said statement, and order of the court denying defendants *for* new trial, and notice of appeal in the above-entitled action.

135 And we do further certify that a good and sufficient undertaking on appeal in due form of law has been duly given and filed, all of which we certify, under section 953 of the code of civil procedure of this State, with intent to use said transcript on appeal in this action.

November 9, 1885.

HOWARD & ROBARTS AND
A. L. RHODES,
Attorneys for Plaintiff and Respondent.
H. K. S. O'MELVENY,
Sole Attorney for Defendants and Appellants in Supreme Court.

136 Service accepted by copy this 12th day of Nov., 1885.
HOWARD & ROBARTS,
Attorneys for Respondent.
C. H. DUNSMOOR, *Clerk*,
By L. J. THOMPSON, *Dep'ty.*

137 *Submission of Cause.*

In the Supreme Court, State of California, Department Two.

BOTILLER *et al.*
v.
DOMINGUEZ. } 11336.

May 31, 1886.—Ordered cause stand submitted. The court.

(Title court and cause.)

Aug. 31, 1886.—Ordered heard in bank. By the chief justice.

(Title court and cause.)

Jan'y 21, 1887.—Appellant allowed 10 days to file brief, cause to be thereon submitted.

(Title court and cause.)

Feb'y 3, 1887.—Ordered submitted. The court.

138 In the Supreme Court of the State of California. In Bank.

BRIGIDO BOTILLER *et al.*, Appellants,
vs.
DOMINGO DOMINGUEZ, Respondent. } No. 11336.

On appeal from the superior court in and for the county of Los Angeles.

And now, at this day, this cause being called and having been heretofore submitted and taken under advisement and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by the court; whereupon it is adjudged and decreed by the court that the judgment and order of the superior court in and for the county of Los Angeles in the above-entitled cause be, and the same are hereby, affirmed.

139 *Opinion.* (*Filed April* 26, 1887.)

In the Supreme Court of the State of California. In Bank.

BOTTILLER
vs.
DOMINGUEZ. } No. 11336.

THE COURT: This is an appeal from a judgment on a verdict

rendered in the superior court of Los Angeles county in an action of ejectment.

The plaintiff claims title to the lands in controversy as daughter and heir-at-law of Apolonio Dominguez, deceased, who acquired title to the premises by mesne conveyances from Nemesio Dominguez, one of the grantees of the Mexican grant of "Las Virgenes," situate in Los Angeles county.

The grant was not presented to the board of United States land commissioners, and the questions presented are not materially different from those which were passed upon in Phelan *vs.* Poyoreno, No. 11373, and for the reasons given in the opinion filed in that case the judgment and order appealed from in this case are affirmed.

Judgment and order affirmed.

140 (Title court and cause.)

May 21, 1887.—Filed petition for rehearing.

(Title court and cause.)

May 24, 1887.—Rehearing granted. The court. McFarland, J., dissenting.

Title court and cause.

Aug. 17, 1887.—Argued by Roberts for respondent. Appellant allowed 10 days to file brief; respondent 10 days to reply; cause to be thereon submitted.

(Title court and cause.)

Sept. 5, 1887.—Cause ordered submitted.

141 In the Supreme Court of the State of California. In Bank.

BRIGIDO BOTILLER, *et al.*, Appellants,
vs.
DOMINGA DOMINGUEZ, Respondent. } No. 11336.

On appeal from the superior court in and for the county of Los Angeles.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by the court. Whereupon it is adjudged and decreed by the court that the judgment and order appealed from — the superior court in and for the city and county of Los Angeles in the above-entitled cause be, and the same are hereby, affirmed.

142 *Opinion.* (*Filed December* 29, 1887.)

In the Supreme Court of the State of California. In Bank.

BOTILLER *vs.* DOMINGUEZ. } No. 11336.

By the COURT:

The judgment and order appealed from in this cause are affirmed upon the doctrine enunciated and for the reasons given in Phelan *vs.* Poyoreno, 13 Pac. Rep., p. 681.

We do not regard the fact that juridical possession was given before the approval of the grant by the departmental assembly sufficient to charge the status of the case, or differentiate it from the case above mentioned.

143 *Assignment of Errors.*

In the Supreme Court of the United States.

BRIGIDO BOTILLER *et al.*, Plaintiffs in Error,
vs.
DOMINGA DOMINGUEZ, Defendant in Error.

In error to the supreme court of the State of California.

The plaintiffs in error herein make the following specifications and assignment of errors:

First.

The court erred in taking jurisdiction to pass upon the validity of a claim of title to lands in the State of California, derived solely from a grant or pretended grant alleged to have been made by the government of Mexico, which claim of title had never been presented to the board of land commissioners under the act of Congress of March 3, 1851, entitled "An act to ascertain and settle private land claims in the State of California."

Second.

The court erred in holding that under the said act of Congress of March 3rd, 1851, it was not necessary for each and
144 every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican Governments to present such claim to the board of land commissioners appointed under said act.

Third.

The court erred in holding that the grant or pretended grant from the government of Mexico relied upon by the defendants in error

herein was a perfect grant and conveyed to the said defendants in error a valid legal right to the lands in controversy.

Fourth.

The court erred in admitting in evidence (against objection duly made) the alleged expediente of the so-called grant from the government of Mexico of the land in controversy, it having been admitted at the trial that such alleged grant had never been presented to the United States board of land commissioners under said act of Congress of March 3d, 1851.

Fifth.

The court erred in admitting in evidence (against objection made thereto) an alleged instrument of concession or grant of the lands in controversy, bearing date October 1, 1834, for the reason set forth in the foregoing specification number four, and for the further reason that such concession or grant appears to have been made upon the condition precedent that it should be approved by the supreme government of Mexico, which approval is not shown to have been obtained.

Sixth.

The court erred in admitting in evidence (against objection) the expediente documents above mentioned and translations
145 thereof, for the reason that the governor, in making the alleged grant evidenced thereby, exceeded his authority in this: That at most he had power to grant only the land asked for in the written petition of applicants, whereas the alleged grant here covered a much larger quantity of land than that asked for in the petition of the applicants, and such grant is void as to the excess of the quantity of land conveyed thereby over that asked for in the petition.

Seventh.

The court erred in admitting in evidence (against objection) a certain document called "The instrument of juridical possession" (1) because the same was made prior to any approval of the alleged grant, and (2) because the description therein contained embraces a quantity of land far in excess of that asked for by the petition of the applicants.

Eighth.

The court erred in denying the motion to strike out all and every part of the evidence for plaintiff in the lower court made at the close of plaintiff's case on the ground that the same and every part thereof was inadmissible and incompetent to prove the issue of title made by the pleadings, for the reason (1) that all of said evidence related to an alleged Mexican grant which never was presented to said board

of land commissioners under said act of Congress of March 3, 1851, and (2) that said alleged title is on its face not a legal title, but at most merely an equitable one.

Ninth.

The court erred in the judgment rendered and entered in this:
That while the defendants disclaim to all land except
146 that described in their answer, yet the court enters judgment against them for the recovery of at least two thousand acres of land of which they never had possession and to which they set up no claim.

Tenth.

The court erred in admitting in evidence (against objection) *that* the documents purporting to show the alleged grant from Mexico, for the reason that it appears therefrom that such grant was made upon the condition precedent that the grantees should build a house upon the land granted within a specific time, and it is not shown by the record here that said condition was fullfilled.

Wherefore the plaintiffs in error herein pray that the judgment in this writ of error mentioned be vacated and reversed.

Dated March 30th, A. D. 1888.

JAMES M. GITCHELL,
CHASE GITCHELL,
Attorneys for Plaintiffs in Error.

Endorsed: 11336. United States Supreme Court. B. Botiller *et al.*, pl'ffs in error, *vs.* D. Dominguez, def't in error. Assignment of errors. Filed M'ch 30, 1888. J. D. Spencer, clerk, by Ben. M. Maddox, deputy. Jas. M. Gitchell and Chase Gitchell, attorneys for pl'ffs in error.

147 In the Supreme Court of the United States.

BRIGIDO BOTILLER *et al.*, Plaintiffs in Error,
vs.
DOMINGA DOMINGUEZ, Defendant in Error.

In error to the supreme court of the State of California.

We hereby enter our appearance as attorneys for the plaintiffs in error herein.

San Francisco, March 30, A. D., 1888.

JAMES M. GITCHELL,
CHASE GITCHELL,
Attorneys for Plaintiffs in Error.

Endorsed: 11336. U. S. Supreme Court. Botiller *et al.*, pl'ffs i error, *v.* Dominguez, def't in error. Appearance. Filed M'ch 3 1888. J. D. Spencer, clerk, by Ben. M. Maddox, deputy. James M Gitchell and Chase Gitchell, att'ys for pl'ffs in error.

148 *Bond.*

In the Supreme Court of the State of California.

DOMINGA DOMINGUEZ, Plaintiff and Respondent,
vs.
BRIGIDO BOTILLER *et al.*, Defendants and Appellants. } No. 11336.

Bond on writ of error.

Know all men by these presents that we, Olney Whiteside and H. M. Russell, of the city of Los Angeles, county of Los Angeles, and State of California, are held and firmly bound unto the said Dominga Dominguez, plaintiff in the above-entitled action, her heirs, executors, administrators, and assigns, in the full sum of one thousand dollars ($1,000.00); for the payment of which, well and truly to be
149 made, we bind ourselves and each of us, our heirs, executors, and administrators and each of them, firmly by these presents.

Whereas the above-named defendants have procured a writ of error to the Supreme Court of the United States to reverse the judgment entered against the said defendants in the above-entitled cause:

Now, the condition of this obligation is such that if the said defendants and plaintiffs in error shall prosecute their said writ of error to effect and shall answer all costs and damages if they shall fail to make good their plea, then this indenture shall be void; otherwise to remain in full force and effect.

Witness our hands and seals this 13th day of February, A. D. 1888.

OLNEY WHITESIDE. [SEAL.]
H. M. RUSSELL. [SEAL.]

STATE OF CALIFORNIA, } ss:
County of Los Angeles,

Olney Whiteside and H. M. Russell, the persons named in and who subscribed — the foregoing bond as sureties thereto, being severally duly sworn, each for himself says that he is worth the sum of one thousand dollars, the sum specified therein as the penalty thereof, over and above all his just debts and liabilities and exclusive of property exempt from execution.

150 OLNEY WHITESIDE.
H. M. RUSSELL.

Sworn to and subscribed before me this 13th day of February, 1888.

[NOTARIAL SEAL.] CHARLES WORTH,
Notary Public.

Approved as a bond to cover costs of appeal but not as a super-

sedeas bond, the time for filing thereof for such purpose having expired and the amount of the bond being only such as is required to cover costs of an appeal.

March 7th, 1888.

NILES SEARLS,
Chief Justice Supreme Court, State of California.

Endorsed: No. 11336. In the supreme court of the State of California. Dominga Dominguez, resp., *v.* Brigido Botiller *et als.*, app'l. Bond on writ of error. Filed M'ch 9, 1888. J. D. Spencer, clerk, by Ben. M. Maddox, deputy. Chase Gitchell, att'y for pl'ffs in error.

151 UNITED STATES OF AMERICA, *ss:*

To Dominga Dominquez, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, on the 8th day of October, A. D. 1888, pursuant to a writ of error duly issued out of the circuit court of the United States, ninth circuit & northern district of California, and duly allowed by the chief justice of the supreme court of the State of California, a copy whereof has been duly lodged for you with clerk of said court, in an action in which Brigido Botiller, F. Botiller, T. Botiller, A. M. Voldez, M. Lamorie, P. Sepulveda, R. Vejar, T. Higuera, A. Tapia, M. Feliz, L. Robles, Sr., L. Robles, Jr., J. M. Leon, B. Selayo, S. Sta. Cruz, E. Stokes, J. Roberts, F. A. Reyes, M. Sanchez, F. Dominguez, J. C. Dominquez, P. Bojorquez, E. Sepulveda, G. Rocha, G. Tapia, and Juan Yrigoyen are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Niles Searls, chief justice of the supreme court of the State of California, and the seal thereof, this 30th day of March, A. D. 1888, and of the Independence of the United States the one hundred and twelfth.

[SEAL.] NILES SEARLS,
Chief Justice Supreme Court, State of California.

Endorsed: 11336. In the Supreme Court of the United States. *Supreme Court.* Brigido Botiller *et als.*, pl'ffs in error, *vs.* Dominga Dominguez, def't in error. Citation. Filed M'ch 30, 1888. J. D. Spencer, clerk, by Ben. M. Maddox, deputy.

Service of the within citation by copy admitted this 30th day of March, A. D. 1888.

A. L. RHODES,
Attorneys for Def't in Error.

152 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of California, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said supreme court, before you, between Dominga Dominquez, plaintiff and defendant in error, and Brigido Botiller, Tadeo Botiller, Felipe Botiller, Antonio M. Valdez, Miguel Lamorie, Pedro Sepulveda, Ramon Vejar, Trinidad Higuera, Antonio Tapia, Manuel Feliz, Loreto Robles, Sr., Loreto Robles, Jr., Jose M. Leon, Bernardino Selayo, Senor Sta. Cruz, Eduardo Stokes, Jose Roberts, Francisco A. Reyes, Manuel Sanchez, Fernando Dominguez, Jose Casimero Dominguez, Pablo Bojorquez, Fnrique Sepulveda, Guaduloupe Rocha, Gregorio Tapia, Ramon Tapia, and Juan Yrigoyen, defendants and plaintiffs in error, a manifest error hath happened, to the great damage of the said defendants and plaintiffs in error, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said United States Supreme Court to be there and then held, that, the record and proceedings aforesaid be- inspected, the said United States Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 25th day of January, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and 12th.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

L. S. B. SAWYER,
Clerk U. S. Circuit Court, Northern District of California.

The above writ of error is hereby allowed.

NILES SEARLS,
Chief Justice Supreme Court, State of California.

[Endorsed:] United States Supreme Court. Brigido Botiller *et als.*, pl'ffs in error, *vs.* Dominga Dominguez, def't in error. Writ of error. Filed M'ch 9, 1888. J. D. Spencer, clerk, by Ben. M. Maddox, deputy.

153 *Clerk's Certificate.*

In the Supreme Court of the State of California.

BRIGIDO BOTILLER *et al.*, Pl'ffs in Error,

v.

DOMINGA DOMINQUEZ, Def't in Error.

I, J. D. Spencer, clerk of the supreme court of the State of California, do hereby certify that the foregoing one hundred and fifty-two pages, numbered from one to one hundred and fifty-two, both numbers inclusive, contain a full, true, and correct transcript of the proceedings in the cause above entitled, and that the same together constitute the return to the annexed writ of error.

In witness whereof I have hereunto set my hand and affixed my official seal this first day of September, 1888.

[Seal Supreme Court of California.]

J. D. SPENCER,
Clerk Supreme Court, State of California,
By BEN. M. MADDOX,
Deputy Clerk.

Endorsed on cover: California supreme court. No. 1370. Brigido Botiller, F. Botiller, T. Botiller, A. M. Valdez, M. Lamorie, *et al.*, plaintiffs in error, *vs.* Dominga Dominguez. Filed October 17, 1888.

No. 1370.

IN THE SUPREME COURT OF THE UNITED STATES.

BRIGIDO BOTILLER ET AL.,
Plaintiffs in Error,

vs.

DOMINGA DOMINGUEZ,
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

J. M. GITCHELL,
Attorney for Plaintiffs in Error.

153 *Clerk's Certificate.*

In the Supreme Court of the State of California.

BRIGIDO BOTILLER *et al.*, Pl'ffs in Error,
v.
DOMINGA DOMINQUEZ, Def't in Error.

I, J. D. Spencer, clerk of the supreme court of the State of California, do hereby certify that the foregoing one hundred and fifty-two pages, numbered from one to one hundred and fifty-two, both numbers inclusive, contain a full, true, and correct transcript of the proceedings in the cause above entitled, and that the same together constitute the return to the annexed writ of error.

In witness whereof I have hereunto set my hand and affixed my official seal this first day of September, 1888.

[Seal Supreme Court of California.]

J. D. SPENCER,
Clerk Supreme Court, State of California,
By BEN. M. MADDOX,
Deputy Clerk.

Endorsed on cover: California supreme court. No. 1370. Brigido Botiller, F. Botiller, T. Botiller, A. M. Valdez, M. Lamorie, *et al.*, plaintiffs in error, *vs.* Dominga Dominguez. Filed October 17, 1888.

No. 1370.

IN THE SUPREME COURT OF THE UNITED STATES.

BRIGIDO BOTILLER ET AL.,
Plaintiffs in Error,

vs.

DOMINGA DOMINGUEZ,
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

J. M. GITCHELL,
Attorney for Plaintiffs in Error.

In the Supreme Court

OF THE

UNITED STATES.

BRIGIDO BOTILLER ET AL., PLAINTIFFS IN ERROR,

vs.

DOMINGO DOMINGUEZ, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR.

The facts of this case are as follows:

(1) The action was originally brought in the Superior Court of the County of Los Angeles, in the State of California, by Dominga Dominguez (defendant in error here) against Brigido Botiller *et al.* (plaintiffs in error here) to recover possession of that certain tract of land situated in said State and county, and known as the Rancho Las Virgenes.

(2) That the title under which the said Domingo Dominguez, defendant in error here, claims to hold said lands, is based solely upon a grant or pretended grant claimed to have been made by the Government of Mexico to Nemecio Dominguez and Domingo Carrillo on the 1st day of October, 1834.

(3) That said grant or pretended grant of land never was presented for confirmation to the Board of Land Commissioners, appointed under the Act of Congress of March 3, 1851, "for the purpose of ascertaining and settling private land claims in the State of California," either by the said Nemecio Dominguez or by any other person.

(4) That said Brigido Botiller *et al.* (the plaintiffs in error), prior to the commencement of the action, had settled upon, and severally were in the occupancy of, the respective parcels or tracts of land claimed by them, and have improved and cultivated the same, and are in possession thereof, with the purpose and intention of holding and improving the said several tracts of land so severally held, as pre-emption, or homestead settlers thereon, claiming the same to be public lands of the United States.

(5) That said Brigido Botiller *et al.*, and each of them, are citizens of the United States, over the age of 21 years. and severally occupy the respective tracts or parcels of land described in their joint answer.

(6) That in no instance does any one of said plaintiffs in error occupy more than one hundred and sixty acres of said land.

(7) That said several tracts of land so claimed and occupied by said plaintiffs in error, and each of them, are agricultural lands.

(8) That said several tracts of land so claimed and occupied by the plaintiffs in error are within the territorial limits of the said so-called Rancho Las Virgenes.

(9) That the validity of the Mexican grant, under which alone the defendant in error claims title to the lands in controversy, was directly drawn in question, and on the trial the Judge instructed the jury as follows:

"First. It is made my duty to construe the written instruments received in evidence in this case, and to declare their effect. I therefore instruct you that the document, Plaintiffs' Exhibits A and B, and the acts evidenced thereby, under the Mexican law in force at the time they were made, constituted a

perfect grant, and operated to vest in the grantees therein named all the right, title and interest of the Mexican Government. They invested as much title under the laws of Mexico in the grantee, as does a patent from the United States to the patentee under our system of government.

"Second. The title to the land by grant from Mexico being perfect at the time of the acquisition of California by the United States, the grantee was not compelled to submit the same for confirmation to the Board of Land Commissioners established by the Act of Congress of March 3, 1851, nor did the grantee, Nemecio Dominguez, forfeit the land described in the grant by a failure to present his claim for confirmation before said Board of Land Commissioners, and the title so acquired by him may be asserted by him or his successors in interest in the courts of this country."

Transcript, folios 117–118.

To which ruling and instructions the defendant in the trial court then and there duly excepted.

And thus is raised the ultimate question of the jurisdiction of the State courts of the State of California to determine the validity of private land claims in California derived from the Spanish or Mexican Government.

There has been a final decision herein by the highest court in the State in which a decision in the suit could be had. This decision necessarily involved the construction of a treaty made between the United States and the Government of Mexico. The case also necessarily involved the validity of a statute of the United States, and the decision was against its validity.

ASSIGNMENT OF ERRORS.

(1) The Court erred in holding that under said Act of March 3, 1851, it was not necessary for each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican Governments to present such claim to the Board of Land Commissioners appointed under said Act.

(2) The Court erred in taking jurisdiction to pass upon the validity of a claim of title to lands in the State of California, derived solely from a grant or pretended grant alleged to have been made by the Government of Mexico, which claim

of title had never been presented to the Board of Land Commissioners under the Act of Congress of March 3, 1851, entitled "An Act to ascertain and settle private land claims in the State of California."

We shall claim that—

I.

THE UNITED STATES, BY THE ACT OF MARCH 3, 1851, ESTABLISHED A SPECIAL TRIBUNAL, TO WHICH ALL CLAIMS TO LANDS MADE BY VIRTUE OF ANY RIGHT OR TITLE DERIVED FROM THE SPANISH OR MEXICAN GOVERNMENT WERE REQUIRED TO BE PRESENTED, AND GAVE TO SUCH TRIBUNALS, AND TO THE FEDERAL COURTS THEREIN DESIGNATED, PLENARY AND EXCLUSIVE JURISDICTION OVER ALL SUCH CLAIMS.

By the ninth Article of the Treaty of Guadalupe Hidalgo, it was stipulated—

"That Mexican citizens shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without molestation."

U. S. Stats. at Large, Vol. 9, p. 922.

Here, then, was a contract entered into between the United States, acting through the political branch of their Government, and the Government of Mexico. In what manner and by what means the stipulations of the treaty should be carried out was a matter for the consideration of the political department of the Federal Government alone. And until Congress had provided the means for the the proper execution of the treaty, no Court was authorized to determine what cases fell within its provisions, or what titles to property the United States should be bound to respect.

Large tracts of land were soon found to be in possession of private persons who claimed to hold the same by virtue of some right or title derived from the Spanish or Mexican Government, and, until the validity, location and extent of such claims should have been determined, the Federal Government could not provide for the survey and sale of the public lands within the State, and therefore the immediate and pressing duty of the Government, under the obligations

of the treaty, was to take measures for ascertaining and settling such rights or titles.

In speaking of this duty, Mr. Justice Field, in delivering the opinion of this Court in the case of *Beard* v. *Federy*, 3 Wall., 478, said :

"The obligation to which the United States then succeeded was, of course, political in its character, and to be discharged in such manner and on such terms as they might judge expedient. By the Act of March 3, 1851, they have declared the manner and the terms on which they will discharge this obligation."

As this is the only Act of Congress under which any Court, either State or Federal, has ever been authorized to pass upon the validity of titles to land in California, acquired under that treaty, it may be well, at this point, to look at some of the more important sections of the Act, in order that we may clearly see in what manner, and on what terms the United States then determined to discharge such obligations.

The first section of the Act (U. S. Stats. at Large, Vol. 9, p. 631) provided—

"That for the purpose of ascertaining and settling private land claims in the State of California, a Commission shall be and is hereby constituted, to consist of three persons," etc.

Here, then, was a special tribunal, constituted by Congress for the sole purpose of ascertaining and settling private claims in the State of California, to lands acquired by said treaty—not to determine the validity of titles, which, under grants derived from Spain or Mexico were claimed to be perfect, nor yet to ascertain the equities of inchoate grants, but to *ascertain and settle all* private land claims in California, *legal, as well as equitable.* And by the fifteenth section of said Act, the final decree of said Commission, unappealed from, was made conclusive, alike against the claimants and the Government of the United States.

It was no less important that the Federal Government should be apprised of the location of perfect than of imperfect claims. And this Commission was the only tribunal upon which Congress conferred original jurisdiction over

such titles. The United States could only determine the extent of their own acquisitions under the treaty by first ascertaining the extent of all private claims to lands in the ceded territory. And before any such claim, inchoate or legal, could be allowed, its validity must be determined by some tribunal thereto properly authorized, whose decision should be made conclusive alike upon the claimant and the Government. No court then in existence had such power, and instead of conferring original jurisdiction in such cases upon any Federal Court before then established, Congress saw fit to create this special tribunal.

The archive evidence of all such claims consisted of petitions, with or without diseños, consultations, orders, correspondence, prohibitions, licenses, etc., all of which were in the Spanish language; and we find that in the second section of said Act, Congress provided that—

"A secretary skilled in the Spanish and English languages shall be appointed by the said Commissioners, whose duty it shall be to act as interpeter, to keep a record of the proceedings of said Board in a bound book, to be filed in the office of the Secretary of the Interior on the termination of the commission."

9 Stats. at Large, p. 631.

The purposes of this section are obvious, as are also the impossibilities of their being accomplished by the trial of any such claims in any State court.

The fourth section of the Act provides for the appointment of—

"An agent learned in the law and skilled in the Spanish and English languages, whose special duty it shall be to superintend the interests of the United States in the premises; to collect testimony in behalf of the United States, and to attend on all occasions when the claimant in any case shall take depositions. And no deposition on behalf of a claimant shall be read in evidence unless notice of the time and place of taking the same shall have been given in writing to said agent, or to the United States District Attorney for said district."

Ibid, p. 631.

It is part of the history of this land litigation in the State of California that forged and falsified claims for large tracts of land were presented to the Commissioners, which were only defeated by the strenuous and peristent efforts of the agents and attorneys of the United States. And that still other claims were presented and imposed upon the Commissioners and upon the appellate courts, by fraud and perjury which defied the utmost skill and ingenuity of such agent and attorney, but which in after years were discovered to have been forged.

If the State courts of the State of California are to take jurisdiction to pass upon the validity of private claims to lands in California, held "by virtue of any right or title derived from the Spanish or Mexican Government," what provision is made by the law for the protection of the interests of the United States in such courts?

The eighth section of the Act provides that—

"Each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican Government, shall present the same to the said Commissioners, when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims;" and directs the Commissioners in the discharge of their duties on the hearing of such claims."

If, under the first section of the Act, there could be a reasonable doubt of the necessity of presenting *all* such claims to the Commissioners, surely such doubt must be at once set at rest by the simple reading of this section. It would be difficult to conceive how language requiring the presentation of such claims could be made plainer, clearer, or more comprehensive. It needs no explanation or enforcement. It is its own abundant elucidation. And yet the State courts of the State of California, in this case, hold that "the title to the land by the grant from Mexico being perfect at the time of the acquisition of California by the United States, the grantee was not compelled to submit the same for confirmation to the Board of Commissioners established by the Act of March 3, 1851."

A decision more directly opposed to the plain language of the Act, it might be difficult to find. The Court first assumes

jurisdiction to pass upon the validity of a title to lands over which the Commission was given plenary and exclusive jurisdiction, and then decides, in defiance of the plain requirement of the law, that the claimant was not required to submit such title for the confirmation of such Board of Commissioners. Not only was original jurisdiction in all such claims conferred solely upon the Commissioners, but no provision was made in any event for the removal by appeal or otherwise of any such case from the Commissioners to any State court.

The ninth section of the Act provided "That in all cases of the rejection or confirmation of any claim by the Land Commissioners, it shall or may be lawful for the claimant, or the District Attorney in behalf of the United States, to present a petition to the District Court of the United States, praying the said Court to review the decision of the said Commissioners, and to decide upon the validity of the said claim." And by section ten either party is authorized to appeal any such case from the decision of the District Court, directly to the Supreme Court of the United States.

These, then, are the only courts upon which jurisdiction has been conferred for the trial of such cases.

Indeed, the power of Congress to confer jurisdiction upon State courts to dispose of such questions might well be doubted. The eleventh section of the Act provides that the designated courts, "in deciding on the validity of any claim brought before them, under the provisions of this Act, shall be governed by the Treaty of Guadaloupe Hidalgo," etc. And by the second section of Article III of the Constitution of the United States, questions arising under treaties made and to be made under the authority of the United States, are reserved to the Federal judiciary.

The view of the Act of March 3, 1851, that we have endeavored to enforce, is sustained by the better decisions of the Supreme Court of California, and by the uniform opinions of this Court, whenever expressed, as will be seen by a brief reference to some of the reported cases.

The Supreme Court of California says:

"By the Act of March 3, 1851, the Government has afforded the means of protecting all titles, legal or equitable. The power to thus provide results from the fact that it is sovereign and supreme as to all matters connected with the treaty and the enforcement of the obligations incurred thereunder. * * * It must determine for itself what claims to property existed at the date of the treaty."

Teschmaker v. *Thompson*, 18 Cal., 11.

Again: Judge Rhodes, now the senior counsel for the defendant in error in this case, in delivering the opinion of the California Supreme Court, (of which he was then a member) says:

"The Court will take judicial notice that according to the provisions of the Act of Congress of March 3, 1851, every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican Government, should present his petition for the confirmation of his claim to the Board of Land Commissioners. * * * The only forum in which this fact," [that of there being a grantee] "can be found, or the questions relating to it investigated, * * * is the Board of Land Commissioners or the United States District Court or Supreme Court. Their jurisdiction of all matters touching the claim of the petitioner to the lands, and of proceedings for final confirmation is plenary and exclusive"

Semple v. *Hagar*, 27 Cal., 163.

If it be true, as was very properly said by Judge Rhodes in that case, that "*every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican Government, should present his petition for the confirmation of his title to the Board of Land Commissioners,*" and that the *jurisdiction of the Board of Land Commissioners and the United States District or Supreme Courts, "of all matters touching the claim of the petitioner to the land, and of proceedings for final confirmation was* PLENARY *and* EXCLUSIVE," where did the State Court find its authority to decide in this case, that the grant and exhibits under which the defendant in error claimed title, "under the Mexican law in force at the time they were made, constituted a perfect grant, and operated to vest in the grantees therein named all the right, title and interest of the Mexican government,"

or that "they invested as much title under the laws of Mexico in the grantee, as does a patent from the United States to the patentee under our form of government," or that "the title to the land by grant from Mexico being perfect at the time of the acquisition of California by the United States, the grantee was not compelled to submit the same for confirmation to the Board of Land Commissioners established by the Act of Congress of March 3, 1851." These were matters over which the jurisdiction of the Board of Land Commissioners and of the District and Supreme Courts was PLENARY and EXCLUSVE. And this Court has again and again held that the Act of March 3, 1851, required the presentation of *all* such claims to said Board.

Chief Justice Taney, in delivering the opinion of this Court, says:

"It will be seen from the quotations we have made that the eighth section [of the Act of March 3, 1851,] embraces not only inchoate or equitable, but *legal* titles also, and requires them *all* to undergo examination by the Court. The object of the provision seems to be to place the titles of land in California upon a stable foundation, and to give the parties who possess them an opportunity of placing them upon the records of the country in a manner that will prevent further controvery."

"In this respect it differs from the Act of 1824, under which the claims in Louisiana and Florida were decided. The jurisdiction of the Court in those cases was confined to inchoate or equitable titles, which required some other act of the Government to vest in the party the full ownership. If he claimed to have obtained from either of the former Governments a perfect title, he was left to assert it in the ordinary forms of law, upon the documents under which he claimed. The court had no power to sanction or confirm it when proceeding under the Act of 1824 or the subsequent Acts extending its provisions."

Fremont v. *United States*, 17 How., 553.

Again the Court says:

"The matters to be submitted by Congress to the enquiry and determination of the Board of Commissioners by the Act of March 3, 1851, and to the courts of the United States on appeal, are the claims of each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican Government. *And it will be at once understood that these comprehend all private claims to land in California.*"

United States v. *Fossatt*, 21 How., 447.

Again:

"Power to decide upon the validity of any claim to land in California, by virtue of any right or title derived from the Spanish or Mexican Governments, as a matter of original jurisdiction, is, by the Act of the 3d of March, 1851, exclusively conferred upon the Commissioners appointed under the first section of the Act."

U. S. v. *Castillero*, 2 Black, 158.

And Judge Field, in delivering the opinion of the Court in a case already quoted (*Beard* v. *Federy*, 3 Wall., 492, says:

"By the Act of March 3, 1851, they (the United States) have established a special tribunal before which all claims to land are to be investigated, required evidence to be presented respecting the claims, appointed law officers to appear and contest them on the part of the Government, authorized appeals from the decision of this tribunal, first to the District and then to the Supreme Court, and designated officers to survey and measure off the land when the validi y of the claim is finally determined."

The same learned Judge, in a case decided in the Ninth Judicial Circuit, says:

"To the Commission every person claiming lands in California, by virtue of any right or title derived from the Spanish or Mexican Government, was required, on pain of forfeiting his land, to present his claim, together with the documentary evidence and testimony upon which he relied for its support."

United States v. *Flint*, 4 Saw., 48.

That was a case in chancery in the Circuit Court of the United States for the Ninth Judicial Circuit, brought for the purpose of setting aside the confirmation of a grant by the Board of Land Commissioners, upon the ground that it was obtained through fraud. The question of the jurisdiction of the Circuit Court was raised, and Judge Hoffman, who sat on the hearing of the matter, concurring with Judge Field in his conclusions, filed a separate opinion, in which he says:

"But in this case the jurisdiction fails, not merely because Congress has confided to other tribunals exclusive jurisdiction over the subject, but also because this Court would have no

power, even if such exclusive jurisdiction had not been vested elsewhere, to decide what are the rights and duties of the United States under the treaty, and to what cases its stipulations apply." * * *

U. S. v. *Flint*, 4 Saw., 84.

And Mr. Justice Davis, in delivering the opinion of this Court, in the case of *Newhall* v. *Sanger*, 92 U. S., 764, says:

"Claims, whether founded upon an inchoate or perfected title, were to be ascertained and adequately protected. This duty, enjoined by a sense of natural justice, and by treaty obligations, could only be discharged by prohibiting intrusion upon the claimants' lands until an opportunity was afforded the parties in interest for a judicial hearing and examination. It was to be expected that unfounded and fraudulent claims would be presented for confirmation. There was in the opinion of Congress, no mode of separating them from those which were valid, without investigation by a competent tribunal; and our legislation was so shaped that no title could be initiated under the laws of the United States to lands covered by a Spanish or Mexican claim, until it was barred by lapse of time or rejected."

To claim that the State Courts of California have jurisdiction over perfect Mexican grants is just equivalent to claiming jurisdiction over all land grants made by that Government;—for how can it be determined that *any* grant is perfect until the documentary evidence shall have been presented and the testimony of witnesses heard, upon which the claimant relies, as was done in this case? Suppose that on the trial of such a claim the State Court finds, at the end of the examination, that the grant is not valid; then all its proceedings, will have been not only voidable, but absolutely void, for want of jurisdiction. And the claim of jurisdiction over valid titles by the State Court involves the absurdity in every case of the trial of the vital fact in controversy before the Court can possibly know that it has jurisdiction to hear any question in the case.

Under the Act of 1824 the jurisdiction of the Commissioners was restricted to inchoate or equitable grants, perfect titles being left to be asserted in the ordinary forms of law, in the State Courts; and where a grantee claimed to have obtained a perfect title from either of the former Govern-

ments the Commission had no authority to pass upon it; and it was held by this Court that the State Courts had no jurisdiction over any claims that were required by the provisions of the law to be brought before the Commissioners.

"The Court of Chancery of the State of Mississippi had no power to establish one of these grants which had not been brought within the provisions of the Act of Congress. The claim itself being utterly void, and no power having been conferred by Congress on that Court to take or exercise jurisdiction over it for the purpose of imparting to it legality, the exercise of jurisdiction was a mere usurpation of judicial power, and the whole proceeding of the Court utterly void."

Hickey et al. v. *Stewart et al.*, 3 How., 762.

The law of 1851, as we have seen, required *all* such claims to lands in California to be presented to the Board of Commissioners. The grant under which the defendant in error in this case claims title, was not so presented, "and no power having been conferred by Congress" on the State courts of California to take or exercise jurisdiction over it, the exercise of such jurisdiction, as was said by this Court in *Hickey et al.* v. *Stewart et al.*, "was a mere usurpation of judicial power, and the whole proceeding of the court utterly void."

And, adopting the language of judge Hoffman in the case of *U. S.* v. *Flint* (*supra*), in reference to the want of jurisdiction of the U. S. Circuit Court over such claims, and changing only the title of the court, may we not confidently assert that:

1. The State courts of the State of California have "no jurisdiction to determine the genuineness and validity of a Mexican land claim, that jurisdiction having been exclusively vested in other and special tribunals."

2. "Even if no such exclusive authority had been conferred on the special tribunals," the State courts of the State of California "would have no jurisdiction to determine how the political department of the Federal Government shall fulfill its treaty stipulations, or to what cases those stipulations apply."

II.

NO COURT, STATE OR FEDERAL, HAS JURIDSICTION TO DETERMINE THE VALIDITY OF ANY CLAIM TO LANDS IN CALIFORNIA BY VIRTUE OF ANY RIGHT OR TITLE DERIVED FROM THE SPANISH OR MEXICAN GOVERNMENT, OTHER THAN SUCH CLAIMS AS WERE PRESENTED TO THE BOARD OF LAND COMMISSIONERS APPOINTED UNDER THE ACT OF CONGRESS OF MARCH 3, 1851, WITHIN TWO YEARS AFTER THE DATE OF SAID ACT.

We have seen that the United States, by the Act of March 3, 1851, created a special tribunal, before which they required all such claims to land to be presented for investigation, and that it is provided by the thirteenth section of said Act, that "all lands the claims to which have been finally rejected by the Commissioners, in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to the said Commissioners within two years after the date of this Act, shall be deemed held and considered as part of the public domain of the United States."

It will be observed that precisely the same disposition was made of lands, the claims to which had been presented to the Commission, and finally decided to be invalid, that was made of lands the claims to which were not presented to the Commission within the time limited by the Act. In fact, that would seem to have been the proper if not the only disposition that could have been made of such lands. There was no partiality shown to any class of claims. If the claimant of any inchoate title failed to establish its equity, or the claimant of what was presented as a legal title, failed to establish its validity, the disposition of the land was in each case the same. And so the penalty for the failure to present either class of claims within the prescribed time was in every case the same.

Said section also provides that the Surveyor General of California shall accurately survey and plot all confirmed lands, and that a patent shall issue to the claimant upon his presenting to the General Land Office an authentic certificate, etc.

The tenth section required the presentation of all such claims. This section limits the time within which such presentation must be made.

A case occurred before the Land Commission in which the claimant had filed his claim within the limited period, but had failed to file "such documentary evidence and testimony of witnesses" as he relied on in support of his claim, and for that cause the commissioners dismissed the petition. The case was removed to the United States District Court, and Judge Hoffman held that the filing of the claim before the Commission within the time limited by law, was such substantial compliance with the terms of the act as to justify the District Judge in allowing the evidence and testimony to be filed in that Court; and in deciding the case the Judge said:

"The first question to be considered is: was the claim presented to the Board of Land Commissioners within the eighth and thirteenth sections? If not, it is barred, and the land must be considered to be part of the public domain."

Swatt v. *U. S.* 1 Hoff. Land Cases, 20.

No attempt was made by the Federal Government either to survey or make sales of any part of the public lands in the State of California, until the expiration of the time limited for the presentation of such land claims. It is true that a Surveyor General for the State was appointed, and his office aquipped and maintained at large expense, but his duties were simply to survey and furnish plots of such private land claims as might be legally confirmed by the designated courts, and it was not until the 3d day of March 1853, (10 U. S. Stats at Large, p. 613) when there were no longer any private land grants in existence that any court had power to confirm; that provision was made for the survey or sale of any part of the public domain. In fact, until then it could not be known what lands were public lands, so all lands within the State had to be reserved from settlement, public survey or sale. After that date there was no necessity for their further reservation.

Mr. Justice Davis, in delivering the opinion of this Court, says:

"A failure therefore to present the claim within the required time, * * * rendered it unnecessary to further preserve the lands from settlement and appropriation. They became public in the just meaning of that term, and were subject to the disposing power of Congress."

Newhall v. *Sanger*, 92 U. S. 764.

The limitation provision of the law applies to all claims — legal not less than equitable. If the claim on which the defendant in error bases her title to the lands in controversy in this case, had been presented to the Land Commission one day after the expiration of the time fixed by law, it would have been promptly dismissed, and neither the Commissioners nor the United States District or Supreme Court would have had any power to determine the question of its validity. Is such a law, general in its application, less obligatory on State than on Federal courts? Is there to be no limitation of time for the investigation of the validity of such claims? Are they to be accepted as valid simply because the claimants allege that they are so? If so, then any claimant to such lands, although he might have known that his pretended grant was false and fraudulent, and without the shadow of equity, only needed to refuse to present his claim to the Commission, retain possession of the land for a quarter or a third of a century, as did the defendant in error in this case, and then, if some homestead settler should attempt to settle upon a small portion of the land, go into a State court, set up his forged Mexican title, or his perfect Mexican title, as the case might be, and without any notice to the United States, practically have his title confirmed—doing by indirection what no court was ever authorized to do directly—confirming a Mexican grant without notice—and what no court *with* such notice has had authority to do for more than a third of a century past. Can anything be more absurd than to claim such jurisdiction for the State courts of the State of California?

It is undoubtedly true that a large proportion of the claims brought before the Land Commission, many of which came into and were either confirmed or rejected by this Court, were inchoate or imperfect. But it is also true that perfect legal claims were presented to the said Commission that were appealed and ultimately disposed of by this Court, and neither the Commission, the United States District Court, nor this Court, ever refused to hear such cases, nor either appear to have entertained any question of their jurisdiction to do so. And, what probably is little less strange, nobody seems to have ever claimed jurisdiction over such cases for the State courts, until their presentation to the Commission was barred by law.

But it is claimed, as we understand, not only that perfect titles under grants from Spain or Mexico, were left by the Act of Congress to be asserted in the ordinary forms of law in the State courts, but that the thirteenth section of the Act operated to confiscate private property, and was therefore unconstitutional and void. The first part of this proposition, I think, we have found to be unsupported, either by the law or the decisions of the courts. And to the second it might be sufficient in this case to say that even if it were true in the broadest sense of the term, still that would give to the State courts no jurisdiction over claims to lands derived through treaty with a foreign Government, which the United States, through their political department, have declared to be a part of the public domain.

But after all, practically, does that section amount to anything more than a limitation of the right of action? The mere declaration that lands, the claims to which shall not have been presented to the Commissioners within the prescribed period, "shall be deemed, held and considered as part of the public domain of the United States," adds nothing to the fact of the limitation of the right of action. There is no State in the Union in which there is not some law limiting the right of action for the recovery of the possession of real property. A may have received a patent from the United States for lands of which B is in possession, claiming title. If he permits B to remain in posses-

sion until his right of action is barred by the statute, he loses his property just as certainly as though the statute had declared that at the expiration of the time fixed, the "lands should be deemed, held and considered to be the property of B."

So in the matter of these Spanish and Mexican land grants, the United State having taken possession of the entire territory embracing the State of California, under the treaty of Guadaloupe Hidalgo, established a tribunal before which they required all such claims to be presented for examination, and as a condition of their being considered at all, such claimants were notified to present their claims within the period fixed by the Act. By failing or refusing to do this they simply forfeited their right of action.

Since the 3d day of March 1853, there have been no claims to land in California by virtue of any right or title derived from the Spanish or Mexican Government, save those before then presented to the Land Commission, that any Court, State or Federal, has had power to recognize for any purpose. With that exception, legally there are and have been no such claims in existence, and no action of any Court can impart to them any validity. There never was a time when the decree of any State court would have entitled a claimant under any such grant, whether perfect or imperfect, to a patent from the United States, and no action of any Court can now relieve any delinquent claimant from the penalty incurred by his failure to present his claim as required by law. If any such claimant should feel that he has been deprived of any property to which he was either legally or equitably entitled, let him apply to Congress for relief. But let him not at this late day be permitted to invoke the power of the State Courts of the State of California to interfere in matters over which they never had jurisdiction, and which have long since passed beyond the jurisdiction of any Court.

And to this defendant in error we may properly apply the language of this Court in a similar case:

"Whatever equity, therefore, the defendant in error may be supposed to have, it is for the consideration and decision of Congress, and not for the courts. If she has suffered injury from her own ignorance of the law, the power to repair it rests with the political power of the government, and not the judicial."

Buryess v. *Gray et al.*, 16 How., 48.

This whole question of the necessity for the presentation of perfect grants, and the effect of their non-presentation, seems to have been fully considered by this Court in the very recent case of *Moore* v. *Steinbach et al.*, Sup. Ct., Rep., Vol. 8, p. 1071. And Mr. Justice Field, in delivering the opinion of the Court, says:

"Assuming that the title under the grant was perfect, the obligation of the grantee was none the less to present his claim to the Board of Land Commissioners for examination. The ascertainment of existing claims was a matter of vital importance to the Government in the conduct of its land policy respecting the public lands, and Congress might well declare the failure to present a claim should be deemed an abandonment of it, and that the land covered by it should be considered a part of the public domain."

III.

NO STATE COURT CAN HAVE JURISDICTION TO PASS UPON THE VALIDITY OF THE TITLE OF LANDS COMPOSING A PART OF THE PUBLIC DOMAIN OF THE UNITED STATES.

The question of the jurisdiction of State Courts to pass upon the title to the public lands of the United States was elaborately argued and authoritatively settled by this Court many years ago, in the case of *Wilcox* v. *Jackson*, brought into this Court on error to the Supreme Court of the State of Illinois.

That was a case in which the plaintiff, in the Circuit Court of Cook County, Illinois, claimed title to lands under a certificate of the Register and Receiver of Public Lands of the United States, for the district in which the lands were situated, stating that the lessor of the plaintiff had proved to the satisfaction of the said Register and Receiver that he was entitled to the right of pre-emption; that he had made payments in full, and that on presentation of said certificate

to the Commissioner of the General Land Office he would be entitled to receive a patent for the land described.

The Legislature of the State of Illinois had passed an Act declaring that such a certificrte of the Register of the United States Land Office should be deemed evidence of title in the party sufficient to recover possession of the lands described in the certificate; and the Supreme Court of the State sustained such legislation. The case was removed to this Court, and Judge Barbour, in delivering the unanimous opinion of the Court, said :

" It has been said that the Stste of Illinois has a right to declare by law that a title derived from the United States, which by their laws is only inchoate and imperfect, shall be deemed as perfect a title as if a patent had been issued from the United States. That State has an undoubted right to legislate as she may please in regard to the remedies to be prescribed in her courts, and to regulate the disposition of the property of her citizens by descent, devise or alienation. But the property in question was a part of the public domain of the United States. Congress is invested bv the Constitution with the power of disposing of the public domain, and making all needful rules and regulations respecting it. Congeess has declared, as we have said, by its legislation, that in such a case as this a patent is necessary to complete the title. But in this case no patent had issued, and therefore, by the laws of the United States, the legal title has not passed, but remains in the United States.

"Now if it were competent for a State Legislature to say that notwithstanding this, the legal title shall be deemed to have passed, the effect of this would be, not that Congress had the power of disposing of the public lands and prescribing the rules and regulations concerning their disposition, but that *Illinois* possessed it. That would be to make the laws of Illinois paramount to those of Congress in relation to a subject confided by the Constitution to Congress only. And the practical result, in this very case, would be by force of the State legislation, to take from the United States their own land, against their own will, and against their own laws. We hold the true principle to be this: that whenever the question in any Court. State or Federal, is, whether the title to land which had once been the property of the United States, has passed, that question must be resolved by laws of the United States, but that whenever, according to those laws, the title shall have passed, then that property like all property in the State is subject to State Legislation, so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States. * * *

"When a patent has not been issued for a part of the public lands, a State has no power to declare any title, less than a patent, valid against a claim of the United States."

Wilcox v. *Jackson*, 13 Pet., 515.

Again this Court says:

"With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations respecting it. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property or any part of it, and to designate the persons to whom it shall be made. No State Legislature can interfere with this right or embarrass its exercise."

Gibson v. *Choteau*, 13 Wall., 99.

And if not the Legislature of a State, surely not a court created by such Legislature.

"The whole legislation of the Government in reference to the public lands, declares the patent to be the superior and conclusive evidence of legal title. Until it issues, the fee is in the Government."

Bagnell v. *Burdeck*,, 13 Pet., 450;
Jourdan et al. v. *Barnett et al.*, 4 How., 169.

No patent ever issued for any part of the lands in controversy in this case.

In the case of *Wilcox* v. *Jackson*, as in this, the State courts had assumed jurisdiction to deal with questions touching the disposition of the public lands of the United States. There the State of Illinois, by legislative enactment, undertook to declare that the certificate of the United States Register and Receiver of Public Lands should be evidence of title upon which to recover possession of the lands for which suit was brought, and the State courts sustained such legislation. But this Court held that the Legislature of the State had no power to interfere with the public lands of the United States, and if the Legislature of a State could exercise no such authority, surely the State courts established by the Legislature could have no jurisdiction over such lands.

If it be claimed, however, that the lands in controversy in this case formed no part of the public domain, all we need reply is, that that is clearly a question for the determination of which the State courts can have no jurisdiction. By Congressional legislation, these lands which were derived through treaty with a foreign Government, have been declared to be a part of the public domain of the United States, and there, so far as the State courts are concerned, is an end to all controversy. If it were deemed otherwise—if it were held competent for the State courts to determine that such lands should not be deemed a part of the public domain; that under the treaty of Guadaloupe Hidalgo, they had not vested in the United States; the effect of this would be to make the decisions of the State courts of the State of California paramount to a law of Congress, and that, too, in relation to a subject confided by the Constitution of the United Sates to Congress alone. And, as was said by this Court of the legislation of the State of Illinois in the case of *Wilcox* v. *Jackson, supra*, the practical result in this very case would be, by force of a decision of a State court, to take from the United States, their own lands, against their own will, and against their own laws. And we confidently claim, that whenever the question in any court is, what lands derived under a treaty with a foreign Government have become a part of the public domain of the United States, that question must be resolved by the laws of Congress, and can never be brought within the jurisdiction of the courts of any State.

The State courts of the State of California have undertaken, in this case, to establish the validity of a claim to lands by virtue of a grant derived from the Mexican Government, which claim had never been presented to the Board of Land Commissioners under the Act of March 3, 1851—and that, too, nearly a third of a century after the presentation of such claims has been barred, and all such lands declared by said Act of Congress to be a part of the public domain of the United States. Congress has never conferred power on the State courts to recognize or establish any such grants of land for any purpose whatever. The

claim to these lands never was brought within the provisions of the Act of Congress, by presentation to the Land Commission, and is therefore void; and the lands having been declared by said Act of Congress to be a part of the public domain of the United States, are therefore without the jurisdiction of the State courts, and the exercise of such jurisdiction in this case was a mere usurpation of judicial power, and their whole proceedings utterly void.

J. M. GITCHELL,
Attorney for Plaintiffs in Error.

No. 1370.

SUPREME COURT of the UNITED STATES.

BRIGIDO BOTILLER et al.,

Plaintiffs in Error,

vs.

DOMINGA DOMINGUEZ.

Brief for Defendant in Error.

A. L. RHODES,

Attorney for Defendant in Error.

Supreme Court of the United States.

BRIGIDO BOTILLER ET AL.,

Plaintiffs in Error,

vs.

DOMINGA DOMINGUEZ,

Defendant in Error.

Brief for Defendant in Error.

This is an action of ejectment, the complaint alleging that the plaintiff, Dominguez, was seized in fee, and in possession of the undivided one-seventh of the premises in controversy; that the defendants, Botiller, et al., entered into the possession and ousted the plaintiff therefrom. The defendants filed a joint answer, denying that the plaintiff is the owner or entitled to the possession of the premises; and they aver that the premises are the public and unsurveyed lands of the United States; that they are severally in possession of separate parcels of the premises, intending in good faith to hold the same "as pre-emption or homestead settlers upon said land;" and that they are severally citizens of the United States, and over the age of twenty-one years. The premises constitute a portion of the Rancho Las Virgenes, situated in the County of Los Angeles, which was granted in 1833, by the Governor of California to Nemecio Dominguez, the ancestor of the plaintiff, and to Domingo Carillo.

The plaintiff proved the genuineness of the grant of the Rancho; also that in the year 1835, juridical possession of the Rancho was delivered to the grantees, and that they, and those deriving title from them had been in the possession of the lands up to the time of the ouster by the defendants.

The claim of Nemecio Dominguez for his part of the Rancho was not presented to the Board of Land Commissioners, for confirmation,

under the Act of March 3d, 1851, to settle private land claims in California, he claiming that his grant constituted a perfect title, which did not need any confirmation by the authorities of the United States.

I.

The Record in the Cause does not Present any Federal Question; and the Writ of Error Should be Dismissed.

The only ground upon which the plaintiffs in error can contend that a federal question is presented in the case, is found in the clause of Sec. 709, of the Rev. Stats. of the U. S., which is: "Where any title, right, privilege or immunity is claimed under * * * any treaty or statute of * * * the United States, and the decision is against the title, right, * * * set up or claimed by either party, under such * * * statute."

But the plaintiffs in error do not claim any right in themselves under any Statute of the United States. The utmost extent of their claims is, that under the operation of the Act of March 3d, 1851, the title vested in the United States. The cases in this Court, commencing at an early day, are uniform to the effect that the claim on the part of the defendant in ejectment, that the title to the premises in suit is outstanding in a *third person*, by virtue of a treaty or a Statute of the United States, does not bring the case within the provisions of Sec. 709, of the U. S. Rev. Stats.—the provision being substantially the same as that of Sec. 25 of the Judiciary Act. The claim must be in his own behalf in order to present a federal question of which this Court has jurisdiction, on a writ of error to a State Court. We cite:

Owings vs. *Norwood*, 5 Crouch, 344.
Henderson vs. *Tennessee*, 10 How., 311.
Long vs. *Converse*, 91 U. S , 112.
Miller vs. *Lancaster*, 106 U. S., 542.

II.

The Grant of the Rancho Las Virgenes Constituted a Perfect Mexican Title.

The title under which we claim was granted to our ancestor under the Colonization Law of Mexico of August 18th, 1824, and in pursuance of the regulations of November 21st, 1828, which were made

for the purpose of carrying the Colonization Law into effect. The proceedings were all had between the years 1833 and 1835, both inclusive.

The Colonization Law may be found in Hall's Mexican Law, S. 488 *et seq.*

And the Regulations of 1828 in note to *U. S.* vs. *Cambuston*, 7 Saw., 593.

See also—

Rockwell's Span. and Mex. Law, p. 453;
Hornsby vs. *U. S.*, 10 Wall., 231.

The following proceedings and steps were had and taken in the making of the grant, some of which we will hereafter notice more in detail:

1. The petition to the Governor for "Las Virgenes."

It is in the usual form, and conforms to the requirements of the Regulations of 1828. The petition was presented by Domingo Carillo and Nemecio Domingues. We claim under Domingues. (Translation of the petition into English, Record, p. —.)

2. The deseño which accompanied the petition. This is more than usually accurate.

3. The order of reference. The petition was referred to the Ayuntamiento of Los Angeles for information whether the petitioners possessed the requisite qualifications, and whether the lands were such as should be granted, etc. (Fol. 65.)

4. The informe. This was returned by the Ayuntamiento, and was favorable to the petitioners.

A reference was also made by the Governor to the Reverend Father Minister of the Mission of San Fernando, who reported unfavorably to the petitioners.

The Governor thereupon ordered him to furnish proofs of the matters mentioned in the report.

To this order a reply was made by him.

The Governor held that the report or reply was not entitled to credit, etc., and demanded further proofs, and ordered that they be furnished at his earliest convenience.

Further proofs not being furnished by the Reverend Father Minister, the Governor referred the matter to the Alcalde of Los Angeles, directing him to find upon certain points or issues of fact.

The Alcalde accordingly proceeded to take the testimony and

reported to the Governor. And this was favorable to the petitioners, and all that the law required.

5. The decree of concession, or marginal decree, as it is sometimes denominated.

The decree was thereupon made by the Governor to Domingo Carrillo and Nemecio Domingues, of the lands known by the name of "Las Virgenes,"—the concession bearing date October 1st, 1834.

6. The despacho, or titulo, as it is sometimes called.

This document was issued by the Governor, bearing date October 1st, 1834.

It is in the usual form in such cases, and grants to the petitioners "the tract of land known by the name of Las Virgenes, bounded by the Mission San Fernando and the Rancho Conejo."

It contains the usual conditions, and directs that the proper Judge cause the land to be measured, in accordance with the ordinances for the designation of boundaries; in other words, directs that juridical possession be given.

7. The approval by the Department Assembly.

This is dated August 28th, 1835, and is in the usual form.

8. The record of the title in the archives of the Government.

9. Delivery of Juridical Possession. — This proceeding is characterized by more than the usual formality and precision. The Alcalde had the aid of a competent surveyor—Abel Stearnes—who measured the courses, and caused the corners to be marked. The possession was duly delivered; in fact, Nemecio Domingues had already taken the possession under the grant.

These proceedings, commencing with the petition and terminating with the delivery of the juridical possession, conformed to the law, and constituted all the proceedings that were required, under the Mexican system, in order to vest in the petitioner the title to the lands granted.

Upon an examination of the Colonization Law of 1824, and the Regulation of 1828, it is apparent, and will not, we think, be doubted by any one, that the intent of the law and regulations was to confer the *ownership* of the lands granted; to invest the grantees with what, under the common law, is called *title* to the lands. The proceedings prescribed by the regulations were devised for the purpose of vesting title *absolutely* in the grantee. In that respect, the system was intended to be as complete, as is the system of purchase from the United States, terminating with the patent issued to the purchaser.

It is unnecessary to discuss the proposition that the purpose of that law and those regulations was to enable persons to require the complete ownership of land, to give them the title absolutely, for it has never been doubted.

If it be possible to convey title under those regulations, then we say that the title vested in our ancestor, Nemecio Domingues, and his associate, Domingo Carrillo ; for all the proceedings were regular; and they were particularly accurate, as compared with most other grants of land in California. Every step, down to and including the issue and recordation of the titulo, and the approval thereof by the Department Assembly, is regular and legal; and the delivery of juridical possession appears to have been made and given with more than the usual care and precision; and in that regard it compares favorably with that which is recited and mentioned with approbation in

Malarin vs. *United States*, 1 Wall., 289.

The Court, in that case says, in entire harmony with the decisions on this point, that the juridical possession delivered soon after the execution of the grant, dissipates all doubt as to the amount granted—whether one league or two leagues.

The juridical possession was followed, or, more accurately speaking, was accompanied and preceded, as well as followed, by the actual possession of the lands by the grantees.

It is said in

Graham vs. *United States*, 4 Wall., 261:

"The Mexican law, as well as the common law, made a formal delivery of the possession, or livery of seisin, of the property, essential after the execution of the grant, for the *investiture* of the title."

It is said in

United States vs. *Pico*, 5 Wall., 539,

that the juridical possession "bound the former Government, and is equally binding upon the officers of our Government." Citing, in support of the proposition,

Graham vs. *United States*, 4 Wall., 260.

The Court says, in

Van Reynegan vs. *Bolton*, 95 U. S., 35:

"And when the approval was obtained, there was another proceeding to be taken which was essential to the *complete investiture of the title*, and that was the formal delivery of the possession of the

property by the magistrate of the vicinage, called, in the language of the country, the delivery of the juridical possession. This proceeding involved the establishment of the boundaries of the tract, when there was any uncertainty respecting them. If they were designated in the grant, it required their ascertainment and identification; if they were not thus designated, it required the measurement of the quantity of the grant, and its segregation from the public domain. * * * Ordinarily, the boundaries thus established would be accepted as conclusive by our Government."

The several acts and proceedings in making a grant are recited in

United States vs. *Moreno*, 1 Wall., 400,

and they are not more accurate or precise in any respect than those in this case. The Court there says:

"The record presents every link in the chain of a perfect espediente."

We have here a perfect espediente; a confirmation by the Departmental Assembly; a delivery of the juridical possession of the land granted, and the actual possession of the land by the grantees. We can, therefore, with all propriety, claim that our ancestor took a perfect title, if it was possible to acquire a perfect title under the Colonization Law of Mexico. The cases above referred to, and others that might be cited, leave no room to doubt that it was the intent of the law and the regulations to furnish the means by which individuals might acquire the title—the entire title—to tracts of land, then held by the Government of Mexico.

The law has been fully complied with, and the grantee took the title—the perfect title—to the lands granted by the Governor, and defined and described in the juridical possession.

The only objection that has been presented to our claim of a perfect Mexican title, is the fact that the delivery of juridical possession preceded the approval of the grant by the Departmental Assembly. This point was presented to the Supreme Court of the State upon petition for re-hearing, but it was overruled. See

Dominguez vs. *Botiller*, 74 Cal., 457.

Juridical possession was given June 9th, 1835.

Approval by Department Assembly, August 29th, 1835.

Neither the Colonization Laws of 1824, nor the Regulations of 1828, prescribe the order in which the several steps in the proceeding must be taken. Nor was one uniform order in that regard pursued by the government officials. There is no reason deducible from

the nature or purpose of the proceeding, why the approval should precede the juridical possession, but in fact, in many instances, it ought to succeed it, in order that the boundaries might be accurately known, prior to the approval. And where, as here, the grant was of a specific parcel—not a grant of a specific amount of land—the juridical possession nearly *identified* the boundaries aud did not in any manner affect or limit the grant.

Van Reynegan vs. *Bolton, supra.*

There are many cases which show that the Mexican officials did not regard the observance of any particular order, as of the essence of the proceeding; and we will mention a few of them.

The diseño did not always accompany the petition, but was often dispensed with by the Governor, in the exercise of his dispensing power.

Fremont vs. *U. S.,* 17 Howard, 561.

A concession was approved by the Department Assembly, on condition that within four months, the grantees would furnish the Governor with the diseño.

U. S. vs. *Vaca,* 18 How., 556.

See *U. S.* vs. *Moreno,* 1 Wall., 400.

In one instance the Governor issued the formal grant, and ordered the petitioner to amend the diseño.

U. S. vs. *Moreno,* 1 Wall., 400.

In some instances it was dispensed with.

Hornsby vs. *U. S.*, 10 Wall., 237.

In some instances the *informe* accompanied the petition for the grant.

It would be supposed, that if the order of the several steps in the proceeding was essential, the most importance would be attached to the provisions of Art. 8th of the Regulations of 1828, to the effect that upon the grant being made, "a document signed by the Governor shall be given." That article, literally interpreted, requires the approval of the Department Assembly to be given, before the issue of the formal title paper—the tituto; but it is a matter of common knowledge that, early in the administration of Governor Figueroa, who devised the tituto, or formal title paper, and from thence to the change of flags during Governor Pico's administration, the tituto was more frequently issued before the approval of the Departmental Assembly was given.

Pico vs. *U. S.*, 2 Wall., 281; and many other cases.

We will mention a few instances in which the juridical possession preceded the approval of the Departmental Assembly; in all of which the grants were confirmed under the Act of 1851. We have examined the records in all of the instances mentioned. The numbers given are the numbers of the cases in the Land Commission given in Appendix to Hoffman's Reports.

Sotoyome Rancho, No. 16.—Juridical possession given in 1844. Approved by Departmental Assembly, in 1845.

Huichicha Rancho, No. 165.—Possession, 1842. Approval, 1845.

Canada de Chorro Rancho, No. 220.—Possession, May 1846. Approved, July 1846.

Santa Anita Rancho, No. 343.—Possession, April 1845. Approved, May 1845.

Jurapa Rancho, No. 361.—Possession, 1838. Approved 1840.

Huasna Rancho, No. 363.—Possession, 1844. Approved, 1846.

Los Nogales Rancho, No. 383.—Possession, April 1840. Approved, May 1840.

El Nigre Rancho, No. 399.—Possession, 1843. Approved, 1845.

La Habra Rancho, No. 401.—Possession, 1839. Approved, 1840.

San Bernardo Rancho, No. 454.—Possession, 1842. Approved, 1845.

The cases and instances above cited show that the officials of the Mexican Government did not rigidly observe any particular order in the proceedings for the grants of public lands—that they regarded the proceedings as valid and sufficient to transfer the title, if all the steps were taken, which were required by the Colonization law of 1824, and the Regulations of 1828.

The law required that the Governor should transmit the espediente to the Departmental Assembly for its approval, and it will not be presumed that the Governor would have transmitted the documents to the Departmental Assembly, or that the latter would have approved the grant—thus making it definitively valid—if there had been any fatal irregularity in the proceedings.

This Court says in Fremont's case that it is often necessary to inquire into official customs, forms, and usages of the former government; and that they constitute what may be called the common or unwritten law of the country, while under that government.

Fremont vs. *U. S.*, 17 How., 557.

And the Court said that it would not give the Mexican laws a

narrower or stricter construction than they received from the authorities of that government.

U. S. vs. *Hornsby*, 10 Wall., 237.
Fremont vs. *U. S.*, 17 How., 557.
U. S. vs. *Johnson*, 1 Wall., 329.

It is apparent, from the usage among government officials, that the relative times of the approval of the grant by the Departmental Assembly, and the delivery of juridical possession were not regarded as material; that those officials did not consider that the efficacy of the approval was or could be impaired by the fact that it had been preceded by the juridical possession—in this case by less than three months; and we are confident that this Court, should it consider that the order in which those proceedings were had, was, under a construction of the laws and usages then in force, an irregularity, it was not a material or fatal irregularity.

III.

THE TITLE BEING PERFECT UNDER THE COLONIZATION LAW OF MEXICO AND THE REGULATIONS OF 1828, IT WAS NOT REQUIRED TO BE PRESENTED TO THE BOARD OF LAND COMMISSIONERS, UNDER THE ACT OF 1851.

This proposition would seem to be fully settled in the Supreme Court of the State in

Minturn vs. *Brower*, 24 Cal., 644.

The decision in that case is mentioned with approval in

Stephenson vs. *Bennett*, 35 Cal., 431.
Steinbach vs. *Moore*, 30 Cal., 507.
Seale vs. *Ford*, 29 Cal., 107.
Banks vs. *Moreno*, 39 Cal., 237.

The case of *Minturn* vs. *Brower* was very carefully, thoroughly and elaborately considered by the Court; and the doctrine there laid down that it was not the intent of the Act of March 3d, 1851, to settle private land claims in California—to require persons holding perfect titles to lands in California to present them to the Land Commission provided for by that act for confirmation; and that the holders of such titles could not be required to present them for confirmation, under the penalty of forfeiture of their titles for failure

so to present them, would seem to be sustainable upon well-recognized principles of constitutional law. Those principles have often been stated by this Court in cases involving questions of title derived from foreign governments; and have sometimes been applied by the Court to cases presenting features similar to those in this case. We will hereafter refer to some of those cases.

We think that there would never have been any doubt upon this question, were it not for certain dicta in

Fremont vs. *United States*, 17 How., 452;
United States vs. *Fossatt*, 21 How., 445, and
More vs. *Steinbach*, 127 U. S., 70,

to the effect that the Act of 1851 required the holders of all titles derived from the Spanish or Mexican Governments, whether perfect or imperfect, to present them to the Land Commission for confirmation; that the requirement of the act extended not only to the holders of equitable, inchoate or imperfect titles, but also to the holders of perfect titles.

We employ the term *dicta* with the greatest respect for the Court and its decisions in those cases, and we mean thereby only to say, that the record in neither of those cases presented the question as to whether the act required the presentation to the Land Commission of perfect titles.

It will be conceded on all hands—and there can be no doubt upon the point—that when the holder of any title derived from the Spanish or Mexican Government, presented his claim of title to the Land Commission for confirmation he submitted himself and his title to the jurisdiction of the Land Commission, and of the Courts to which an appeal might be taken from the decree of the Land Commission. The decree of either of those Courts was as final, so far as it respects his title, and as conclusive upon him, as would be a judgment in ejectment in an action in which he and the United States were the opposing parties. He would not thereafter be heard to say that the title which those tribunals had declared invalid, and had rejected, was in fact valid; nor could he be heard to aver that he was entitled to other or further lands than were awarded to him by the decree of confirmation, and the proceedings had under the decree. There are several cases to this effect in the Supreme Court of the State, and none to the contrary so far as we are advised.

In *Fremont* vs. *U. S.*, and *U. S.* vs. *Fossatt*, *supra*, the respective claimants presented to the Land Commission their titles, for con-

firmation; and the same was true of both the parties to *More* vs. *Steinbach*. The question whether it was necessary that the claimants should present their respective petitions for the confirmation of their titles could not by any possibility have arisen.

The cases of Fremont and of Fossatt were appeals taken from the decrees in the confirmation proceedings; and in such cases it is difficult to see how the question of the *necessity* for the presentation of even those claims for confirmation, could have arisen. Both of these cases were cases of imperfect titles. There had been no delivery of juridical possession in either, and therefore each title was an imperfect title in the proper sense of that term. No question, therefore, could legitimately have been presented in either case, as to whether a perfect title required presentation under the Act of 1851. No question was or could have been presented in either of those cases as to whether a title which was definitive and final under the Mexican system of conveyance of public lands, could, under the terms of the treaty, be forfeited by the United States.

In *More* vs. *Steinbach*, the Mexican titles under which the respective parties claimed, and which had been confirmed, were imperfect titles. The defendants claimed that their title was a perfect Mexican title, and contended that a confirmation of the title was not needed —they being fully protected by the treaty between the United States and Mexico. To this position the Court made two conclusive answers: 1st, The defendants' grantors having voluntarily submitted their title to the jurisdiction of ths tribunals appointed by the Act of March 3, 1851, as they had the right to do, are compelled to abide the decree of those tribunals. (The lands in controversy were not included within the boundaries of the lands described in their decree of confirmation.) 2d, The defendants' grantors did not have a perfect Mexican title, because there was wanting from the proceedings one of its essential parts—the juridical possession. Having fully overthrown the defendants' point by each of those answers, it was unnecessary, we submit, for the Court to assume the existence of a fact which the record showed did not exist—that is to say, the delivery of the juridical possession of the rancho, by a proper officer under the Mexican Government—for the purpose of overthrowing the position of counsel, which was not based upon the facts in the record. Can it not be said, with propriety, that a determination as what the Act of March 3, 1851, would have required of the holders of that title, had there been a juridical possession of the land—had they possessed a perfect Mexican title—amounts only to a dictum.

This Court in

United States vs. *Moreno*, 1 Wall., 404, and
Beard vs. *Federy*, 3 Wall., 478,

and the Supreme Court of the State in

Estrada vs. *Murphy*, 19 Cal., 248,

carefully save perfect titles from the construction given in those cases to the Act of 1851, holding only that the Act required the presentation to the Land Commission, of imperfect titles—such titles as were involved in those cases.

We may with propriety repeat, in substance, what is said in *Minturn* vs. *Brower*, *supra*, that no case has been cited, and none, we think, can be found, in which a title, perfect under the Mexican law, was produced before the Court for adjudication, in any form or for any purpose, in which it was held that the title was extinguished, because a petition for its confirmation was not presented to the Board of Commissioners; nor a case involving a perfect title, in which it was held that Congress intended, by the Act of 1851, to declare that lands held under such title should be deemed public lands of the United States, if the title should not be presented for confirmation.

The title by which the plaintiff holds, is no different in its elements, from that by which personal property is held by private parties. Land is no more subject to confiscation by the Government than is personal property. The law of nations affords to all parties within territory ceded by one nation to another, the same protection to one species of property that it does to another. In other words, the government to which territory is ceded, acquires no right to the property which had vested in any inhabitant of the territory prior to the cession.

Articles 8 and 9 of the Treaty of Guadalupe Hidalgo, were made in full recognition of this great principle of international law. Those principles were not inserted in those articles for the purpose of giving any new right to the citizens of the ceded territory, but simply in conservation of the recognized right of such citizens.

The 8th Article provides that Mexicans now established in the ceded territory, shall have the right to continue to reside therein, or to remove at any time therefrom; and that they shall retain the property which they possessed therein, or may dispose thereof, and remove the proceeds thereof, without being subject on that account to any contribution, tax or charge whatsoever; and then provides that, "In the said territories, property of every kind, now belonging to

" Mexicans not established there, shall be inviolably respected. The " present owners, the heirs of these, and all Mexicans who may here- " after acquire such property by contract, shall enjoy, with respect " to it, guarantees equally as ample as if the same belonged to " citizens of the United States."

The 9th Article provided that Mexicans, who should choose, might continue to reside in the ceded territory, and be admitted " to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution; and in the meantime shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion, without restriction."

These articles would seem to preserve the rights of property then held by Mexican citizens in the ceded territory; and in that respect, such citizens are placed on the same footing as citizens of the United States.

There is abundant authority in support of these propositions, although in view of the recognized principles of the law of nations, no authority would appear to be needed.

The treaty under consideration in

United States vs. *Percheman*, 6 Pet., 87,

contains this language:

" His Catholic Majesty concedes to the United States, in full prop- " erty and sovereignty, all the territory which belongs to him, situ- " ated to the eastward of the Mississippi, by the name of East and " West Florida."

The Court, in commenting upon that article of the treaty, says:

" A cession of territory is never understood to be a cession of the " territory belonging to its inhabitants. The King cedes that only " which belonged to him. Lands which he had previously granted " were not his to cede. Neither party could so understand the " cession. Neither party could consider itself as attempting a wrong " to individuals, condemned by the practice of the whole civilized " world. The cession of territory, by its name, from one sovereign " to another, conveying the compound idea of a surrender, at the " same time, of the lands and the people who inhabit it, would be " necessarily understood to pass the sovereignty only, and not to " interfere with private property."

The opinion of Chief Justice Marshall contains other expressions clearly indicating a recognition of the principles of the law of nations,

that the cession of territory by one nation to another did not transfer any right of property belonging to private persons.

The same learned Judge, in

United States vs. *Clark*, 8 Pet., 465,

expresses the same idea. In that case, as well as in the case just cited, the question related to the title to lands claimed under a Spanish grant in Florida. He says:

"Neither the law of nations nor the faith of the United States " would justify the Legislature in authorizing these Boards to annul " pre-existing titles, which might consequently be asserted in the " ordinary Courts of the country against any grantee of the Ameri- " can Government."

However convenient it might be to the Government in ascertaining the boundaries of its own land, to which it acquired title by the cession from Spain, to have individuals holding perfect titles to lands, present their titles to some officer or tribunal, the Court were unable to find—and we hazard nothing in saying that there cannot be found—any principle of law which would uphold the right of the Government to which the cession had been made, to forfeit the title already existing in private parties, under the pretense of ascertaining the boundaries of its own lands. Mere considerations of convenience to the Government will not justify confiscation.

We so contend, in full recognition of the principle, that parties who require the aid of the Government to perfect their titles, must comply with such reasonable rules and regulations as the Government may prescribe, in that regard. We will hereafter refer to the question whether the Government, for the purpose of segregating its lands from those held in private ownership, can legally adopt such rules and regulations as will compel private persons to produce and prove their titles, under the penalty of forfeiture of the lands.

In *United States* vs. *Wiggin*, 14 Pet., 349, the Court refers to Percheman's case, *supra*, and to the case of *United States* vs. *Arredondo*, 6 Pet., 691, and says, that one reason for the construction given to the treaty then under consideration was, that the law of nations protected perfect titles, and that it would be unnatural to hold that perfect titles should be subject to investigation by this Government.

It is said by the Supreme Court, in

Henderson vs. *Poindexter*, 12 Wheat., 543,

in considering titles to lands, east of the Mississippi, and the

Act of 1803, organizing a Board of Commissioners, for their confirmation, that "the whole legislation on this subject requires "that every title to lands in the country which had been occupied "by Spain, should be laid before the Board of Commissioners. "The motives for this regulation are obvious; and as the titles have "no *intrinsic* validity, it was opposed by no principle. Claimants "could not complain, if the law which gave validity to their claims, "should also provide a Board to examine their fairness, and should "make their validity depend upon their being laid before that "Board."

Such claimants, we repeat, needed the aid of the tribunal constituted by Congress, to inquire into the validity of such inchoate and imperfect titles as they then possessed, in order that if they established such imperfect or inchoate titles, they might receive from the Government a grant of the complete and perfect title. But no considerations or reasons of that character can be suggested when the holder possesses what has been denominated a perfect title. He needs no aid from the Government. His title to his lands requires the action of no tribunal for its protection or support; in that respect his title would stand as would his title to cattle or money within the same territory. The Government could not, by legal possibility, give him any aid in the perfection of his title to either, for it is already perfect.

It must be remembered that the right and sovereignty acquired by the United States over California, came by virtue of the cession, which was as essentially a contract between the two Governments, as would be a similar agreement between two private parties holding adjacent lands. The rights of individuals residing within the ceded territory would be protected to the same extent, and in the same manner, and by the same principles of law, that they would in case of the cession of territory by one State of the Union to another State. It is manifest that, in the case supposed, if an individual holds an imperfect title to lands within the territory ceded, he would need the aid of laws, or a tribunal, or of both, to enable him to acquire the legal title to his real estate. The State receiving the cession might provide that such title should pass by virtue of the proceedings carried on in either the legal or political departments of the Government. The individual holding an imperfect title has, for instance, a certificate of purchase issued by the State which had ceded the territory; he could acquire the legal title to the lands only

by application to the State to which the cession was made. He could not complain of any proper conditions or regulations prescribed by law, to enable him to perfect his title. But no one will claim, we think, that an individual who held his lands by virtue of a patent, issued by the State which had ceded the territory, could be required by the State to which the cession was made, to apply to any tribunal or authority whatsoever, for the purpose of re-perfecting that which is already perfect.

A treaty can transfer from one sovereign to the other nothing except that which the granting power owned or possessed. A right or title which the granting power had therefore transferred or conveyed to another, could not be transferred by it to another sovereign.

It was not the intent of the Act of 1851, to subject perfect titles to the action of the Board of Commissioners. The provisions of Section 8 of that Act, that all titles should be subjected to the decision of the Land Commissioners, must be read and interpreted with reference to the other provisions of the Act, and the treaty, and the laws of nations. It requires no argument to prove that the provisions of the Act are to be so construed, if possible, so as to respect and preserve private rights.

In support of the position that perfect titles, granted and issued prior to a cession of the territory within which the lands are situated, do not need the aid of proceedings instituted by the Government receiving the cession, and cannot be confiscated by that Goverment, we refer the Court to the large number of cases in the Supreme Court of the United States—some of which we shall cite—arising within the territories formerly ceded by France and by Spain—in Louisiana and Florida. It is repeated over and again that a perfect title needs no confirmation.

The case of *United States* vs. *Reynes*, 9 How., 144, was a proceeding for the confirmation of the title to lands in Louisiana. The terms of the Statute involved in that suit are not the same in all respects as those of the Act of 1851; but the principles involved in the legislation, and the question of the authority of Congress, are the same as here. The Court there, in considering the claim of right on the part of the petitioner, under the Act of Congress, says:

"In answer to this pretension of right under the Act of 1824, it "might be sufficient to observe, that if this right be asserted in "virtue of a *perfect Spanish title*, it would seem to be comprised "neither within the mischief nor the remedy contemplated by the

" Statute. The mischief intended to be provided for by the Act of " 1824 was the *inchoate* and *incomplete* condition of the titles, having " a fair and just and legal inception under either the French or " Spanish Governments of Louisiana, but which, by reason of the " abdication or superseding of those governments, and by that cause " alone, had not been completed. The remedy was to bring such " titles before the Courts of the United States, and there to render " them complete, and to establish them by proof of the legality and " justice of their origin and character. Such, then, being the mis- " chief declared, and such the remedy provided by the Statute, it is " difficult to perceive the reason or authority for bringing before the " Courts merely for supervision, titles alleged to be already per- " fected under the unquestionable and competent authority of either " Spain or France."

In *United States* vs. *Phila. & N. O.*, 11 How. 648,

the Court affirms the doctrine of the case last cited, to the effect that no power existed under the Act of Congress to pass judgment on a perfect grant, but upheld the jurisdiction of the Court in cases of titles not perfect.

In *United States* vs. *Pillarin*, 13 How., 9,

Chief Justice Taney, in speaking of a perfect title, says it is "protected by the treaty, and is independent of any legislation by Congress, and requires no proceeding of any Court of the United States to give it authority."

In *Dent* vs. *Emmeger*, 14 Wall., 312,

titles having their inception prior to the cession of Louisiana were under consideration. We are well aware of the difference between the language of the Act of Congress there involved and that of the Act of 1851; but both the principles there laid down, and the language used by the Court, are applicable here—the principles being broad, general principles, applicable to titles in case of a change of sovereignty. The Court there says:

"The titles which were perfect before the cession of the terri- " tory to the United States continue so afterwards, and were in no " wise affected by the change of sovereignty. The treaty so pro- " vided, *and such would have been the effect of the principles of the law* " *of nations*, if the treaty had contained no provision on the sub- " ject. According to that code, a change of government was never " permitted to affect pre-existing rights of private property. Per-

"fect titles are as valid under the new government as they were "under its predecessor. But inchoate rights, such as were those of "Cere, were of imperfect obligation, and affected only the con- "science of the new sovereign."

It is sometimes urged that considerations of convenience to the United States in ascertaining the bounds of the public lands justified the enactment of laws compelling persons holding titles to lands to submit their titles to certain tribunals for investigation, and to prove their validity, under the penalty of forfeiture of all right in the lands for failure to comply with those requirements. What would be said to a claim of like authority by the State of New York, because of the actual or alleged existence of many "gores" and parcels of land lying between two or more patents? Upon what legal principle could the State of Kentucky, for a like convenience, and under a similar penalty, require the production of warrants, surveys and patents for lands in that State? The right of a State in this regard is not inferior to that of the United States. Should it be thought by Congress that the bounds of the Presidio Reservation were uncertain and unsettled, Congress, upon the grounds of convenience, might require the holders of all titles to lots in San Francisco to present them for investigation to some commission or other tribunal, under the penalty, for failure or refusal, of a forfeiture of their lots.

No one has undertaken to point to the provision of the Constitution which authorizes Congress, under the guise of ascertaining or segregating the public lands, to forfeit the titles of private persons, which had become perfect, before the cession of California to the United States. There ought, at the very least, to be a *judgment* of forfeiture, to which the holder of the perfect title was a party.

It has sometimes been urged that the requirement of the presentation of perfect titles for confirmation is analagous, in point of power, to the statute requiring the registration of deeds made prior to the statute; and also to statutes of limitations as applicable to antecedent causes of action. But the analogy is not real—nor, indeed, is it apparent. Those statutes are State statutes. The States have, and the United States have not, the power so to legislate. Those statutes merely regulate rights and remedies in respect to property as between individuals, subject to the jurisdiction of the respective States, in which both parties to the action claim title to the property, and the judgment determines the issue as to which party holds the better title.

Registration acts do not provide that if the vendee shall not, within a given time or event, register his deed, the lands shall be deemed to be the lands of the State. Adverse possession, maintained by an individual, does not cause the title to the land to vest in the State.

The United States may dispose of its title to lands as it may deem proper; but it has no power to vest our title in itself by any legislative enactment; nor to acquire it against our will, in any manner, except by the exercise of the power of eminent domain, or by judgment of forfeiture for crime.

IV.

We contend that

CONGRESS HAD NOT POWER, UNDER THE CONSTITUTION, TO REQUIRE THE PRESENTATION OF PERFECT TITLES TO THE BOARD OF LAND COMMISSIONERS, UNDER THE PENALTY OF FORFEITURE OF THE LAND.

This point was not presented in *Minturn* vs. *Brower*, 24 Cal.,—at least, not in the form now attempted. The State, upon its admission into the Union, succeeded—as was said of Alabama—to all the rights of sovereignty, jurisdiction, and eminent domain.

Pollard vs. *Hagan*, 3 How., 223.

The State has all the powers pertaining to sovereignty, except as limited by the Constitution of the United States. All persons and property were subject to its dominion. It has authority to provide for the acquisition, tenure and transmission of titles to property. It regulates domestic relations, trusts, agency and the like. It possesses the right of eminent domain, and all escheats vest in the State. The State has the ultimate jurisdiction over persons and things, except as limited by the Constitution of the United States.

New York vs. *Miller*, 11 Pet., 202.

The Colonization Law of 1824 and the Regulations of 1828 were, after their adoption, and until superseded by the Treaty of Cession, the only laws in force regarding the granting of public lands in California.

U. S. vs. *Vallejo*, 1 Black, 554.
U. S. vs. *Workman*, 1 Wall., 761.
U. S. vs. *Osio*, 23 How., 248.

Those laws provided the means for the acquisition of the *entire and perfect title* by the persons who should petition for grants of lands.

The Court will take judicial notice of the laws of Mexico relating to the granting of public lands.

U. S. vs. *Turner*, 11 How., 668.
Fremont vs. *U. S.*, 17 How., 557.
U. S. vs. *Perot*, 98 U. S., 428.
Payne vs. *Treadwell*, 16 Cal., 231.

And they will take notice of those laws, as they would of a State law of California for the sale of the public lands of the State, and under which lands have been sold, but which was afterwards repealed, upon the adoption of a new law upon the same subject.

Title acquired under the Colonization Law is entitled to the same respect and protection as the title acquired under the first or any other law of the State, providing for the sale of public lands of the State. No one would have the hardihood to attempt to uphold an Act of Congress which, for the alleged purpose of enabling the public lands of the United States to be segregated from lands which the State acquired by virtue of its sovereignty—such as the tide-lands, large portions of which had been sold to private persons,—should require all persons claiming title to lands within the State to present their titles to some tribunal created by the Act, in order that the question of their validity might be determined; and should enact that all titles not so presented should be deemed void.

The Bench and the Bar seem to have discussed the Act of 1851, as if it had been passed while California was a mere province of the United States, and seemingly oblivious of the important fact that, when the Act was passed, California had been admitted as a sovereign State.

The Supreme Court has said, and notably in

Dread Scott vs. *Sanford*, 19 How., 432–41,

that the provision of the Constitution authorizing Congress "to dispose of, and make all needful rules and regulations respecting the Territory, or other property belonging to the State," applies to the Northwestern Territory, and the territory which it was expected that Georgia and North Carolina would cede to the United States, but nid not apply to territory which the United States might obtain from a foreign nation.

While California remained as a mere province—a dependency of the United States—Congress might, perhaps, have exercised all the powers over it which were not prohibited by the Constitution; but after the admission of California as a State, the authority of Congress to exercise therein *any power*, must be found in the Constitution. California stands, in that respect, as does any of the original thirteen States.

Our title having been made by the predecessor of the State, and wider laws which are not to be regarded as foreign laws, is as valid and sacred as any title issued by the State for its lands. If the power claimed resides in Congress, we must be able to place our finger upon the very clause of the Constitution which confers it.

The penalty provided in the Act of 1851 for failure on the part of the owner to present his title to the Board, is the forfeiture of his title—the land is deemed to be public land, and the title extinguished. Had Congress, intermediate the treaty and the admission of California, granted this land to our ancestor, would it be claimed that Congress, after the admission of the State, could have forfeited our title for failure to present it to some new Commission? A forfeiture can be enforced only as a punishment for a crime, and by means of judicial proceedings.

Cooley's Const. Lim., 363–4.

It must be remembered that the United States is and stands, in respect to its lands, as a private proprietor, except that it is not subject to State taxation, or the Statutes of Limitation, or the Statutes regarding conveyances, and enjoys perhaps some other immunities. If Congress can forfeit our lands twenty years after our title became perfect, we cannot perceive why it cannot provide for another forfeiture twenty years after the issue of the patent under the Act of 1851; that is to say, unless for some undiscovered reason, the title issued by the United States is better entitled to protection than one issued by the predecessor or grantor of the United States. It is said in

Fletcher vs. *Peck*, 6 Cranch, 87,

that a State cannot annul her grant of lands. It is equally clear that she cannot annul a grant made by her predecessor. It is also clear the United States cannot annul a grant, valid when made, whether made by the State or its predecessor. The claim of such a power is repugnant to the Constitution of the United States.

We rely with great confidence upon a case in this Court, decided three years after *Minturn* vs. *Brower*, the case of

Reichart vs. *Felps*, 6 Wall., 160.

The cession of the Northwest Territory to the United States contained the condition "that the French and Canadian inhabitants * * * who have professed themselves citizens of Virginia, shall have their *possessions and titles* confirmed to them, and be protected in the enjoyment of their rights and liberties." Congress, by the Act of June 20, 1788, reserved from general sale lands to satisfy those inhabitants, and enacted that they should be confirmed in the possession of such lands, that measures be taken for confirming them in their possessions and titles; that the Governor should examine their possessions and titles, "in order to determine what quantity of land they may severally claim, which shall be laid off for them at their own expense." Governor St. Clair, in 1799, issued to a person under whom the defendant claimed, a document in the form of a patent, confirming to him *in fee* the tract of land in controversy. In 1798 a Surveyor lawfully authorized to survey such claims, surveyed the tract which was afterwards described in the document—the patent issued by the Governor (a proceeding somewhat similar to our juridical possession). The Act of Congress of February 20, 1812, established a Board of Commissioners to revise and re-examine the confirmations made by the Governor. Such Board made such a report that the proper officers rejected this claim; and the Government thereafter sold the land and issued the patents, under which the plaintiffs claimed.

The Court summarily disposed of the Act, so far as it affected the title issued by Governor St. Clair, and the action of the Board and the patents thereafter issued, saying: "Congress is bound to regard the public treaties, and it had no power to organize a board of revision to nullify titles confirmed many years before, by the authorized agents of the Government."

V.

The Second Assignment of Error,

is to the effect that in an action of ejectment, the State Courts have no jurisdiction of the question of the validity of a Mexican grant, until after it has been presented to the Board of Land Commissioners for confirmation—in other words, that the State Courts have no

jurisdiction to receive such a grant in evidence until it has been confirmed.

It is manifest that this assignment does not present a Federal question.

A large number of actions have been maintained in the Courts of the State, upon Mexican grants, and jurisdiction was not declined on the ground that the title had not been presented for confirmation. In some instances, as in *Vanderslice* vs. *Hanks*, 3 Cal., 27, decided at the October term, 1852, the action was commenced before the petition for confirmation was filed, and in others the actions were commenced while the confirmation proceedings were at their several stages; and the Court does not intimate a doubt as to its jurisdiction. Actions amounting to hundreds, probably thousands, in number, have been brought, upon Alcalde grants in San Francisco, San Jose, and other Pueblos; and much the larger part were brought prior to the confirmation of the titles of the several Pueblos. In all of these classes of actions the recoveries were had upon the Mexican titles involved in the actions.

The question whether the Federal Courts would, upon a Mexican title, give judgment against a defendant who is a mere intruder—who holds no title derived from the United States—is not material. The State and its Courts may for themselves declare or determine what shall be sufficient evidence for a recovery against a mere intruder. The numerous cases in the Courts of almost all of the States, within which were public lands of the United States, illustrate this position. Most of those States have enacted that a certificate of purchase, issued by the United States Land Department, is *prima facie* evidence of legal title, upon which a recovery of the possession of the lands may be had; and these enactments have been upheld by the State Courts, and have been recognized as legal by this Court. See

Wilcox vs. *Jackson*, 13 Pet., 516.
Shierburne vs. *Cordova*, 24 How., 423.

The defendant in error—the plaintiff in the action—contends that the writ of error should be dismissed; and if the writ be not dismissed, that the judgment should be affirmed.

Respectfully submitted,

A. L. RHODES,
Attorney for Defendant in Error.

130-236

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 154.

PARLEY'S PARK SILVER MINING COMPANY, APPELLANT,

vs.

JOHN W. KERR.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED OCTOBER 19, 1885.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 154.

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APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, JUNE 30, 1888.

a *Transcript on Appeal.*

In the Supreme Court of Utah Territory. June Term, 1882.

PARLEY'S PARK SILVER MINING COMPANY, Appellant,
vs.
JOHN W. KERR, Respondent.

Sutherland & McBride, appellant's attorneys; Bennett, Harkness & Kirkpatrick, respondents' attorneys.

Filed April 13th, 1882.

E. T. SPRAGUE, *Clerk.*

1 *Complaint.*

In the District Court for the First Judicial District of the Territory of Utah.

PARLEY'S PARK SILVER MINING COMPANY, Plaintiff,
vs.
JOHN W. KERR, Defendant.

Said plaintiff complains of said defendant and alleges:

I.

That said plaintiff is now, and for two years last past has been, a corporation organized and existing under the laws of the State of New York and owning and holding mining property and engaged in working the same in the Territory of Utah.

II.

That said plaintiff is now the owner, subject only to the paramount title of the United States, and in possession of the mining ground and premises hereinafter described, viz: First, the Central Mining Claim, situate in Blue Ledge mining district, Wasatch county, and Territory of Utah, described and bounded as follows: Beginning at a point on the centre line of said mining claim from which the discovery shaft of said claim bears south 83° east, 18 feet distant to the centre of said shaft, running thence north 87° west
2 35 feet to the centre of the westerly end line of said claim, and which is also the easterly end line of the Parley's Park mining claim as surveyed for a patent; thence south 25° 8′ west post No. 1, marked U. S. 144, P. No. 1, which point is the beginning of the exterior boundary of said central claim, and from which post No. 1 U. S. mineral monument No. 1 of Uintah mining district bears north 64° west, 492 feet distant; thence north 25° 58′ east 200 feet to post No. 2, marked U. S. 144, P. No. 2, from which post No. 1, of said Parley's Park mining claim bears north 25° 58′ east, 2½ distant, and post No. 2 of the Lady of the Lake mining claim, as surveyed for a patent, bears north 50¼° east, 170 feet distant; thence south 87°

east 1,500 feet to post No. 3, marked U. S. 144, P. No. 3; thence south 25° 58′ west 200 feet to post No. 4, marked U. S. 144, P. No. 4; thence north 87° west 1,500 feet to post No. 1, the beginning point of the boundary.

Second. The Lady of the Lake mining claim, situate in said Blue Ledge mining district and said county and Territory, described and bounded as follows, with magnetic variation of 16° 30′ east: Beginning at corner No. 1, the southwest corner of the claim, from which U. S. mineral monument No. 1 of Uintah mining district bears north 79° 30′ west, 660 feet distant; thence north 3° east 200 feet to corner No. 2; thence south 87° east 1,500 — to post No. 3; thence south 3° west 200 feet to post No. 4; thence north 87° west 1,500 — to the place of beginning, containing 6.88 acres; that said Central and Lady of the Lake mining claims overlap each other and in part cover the same surface ground.

III.

Said plaintiff further alleges that the defendant claims some interest or estate in said premises, or some part thereof, adverse to said plaintiff, but said claim of said defendant, as said plaintiff avers on information and belief, is without any legal or equitable foundation and void; that the same is a cloud on said plaintiff's title and an injury and damage to said plaintiff; that said plaintiff is greatly
3 embarrassed in the use and disposition of its said mining claim and they are greatly depreciated in value by reason of said adverse claim; that said defendant has not any estate, right, title, or interest whatever in or to said land and premises or any part thereof.

Wherefore the plaintiff prays:

1. That the defendant may be required to set forth the nature of his claim, and that all adverse claims of the defendant may be determined by a decree of this court.

2. That by said decree it be declared and adjudged that the defendant has no estate or interest whatever in or to said land and premises, and that the title of said plaintiff is good and valid.

3. That the defendant be forever enjoined and debarred from asserting any claim whatever in or to said land or premises adverse to the plaintiff; and for such further and other relief as this court shall seem meet and agreeable to equity, and for plaintiff's cost of suit.

SUTHERLAND & McBRIDE,
Plaintiff's Attorneys.

(Duly verified.)
Filed this 18th day of September, A. D. 1880.
A. C. EMERSON, *Clerk*,
By BENJ. BACHMAN,
Deputy Clerk.

Answer.

(Title.)

The defendant answers the plaintiff's complaint and denies that the plaintiff now is or at any time has been the owner, subject to the paramount title of the United States or otherwise, or in the possession of the premises described in the complaint as the Central mining claim; and the defendant denies that the plaintiff now is or at any time has been the owner, subject to the paramount title of the United States or otherwise, of the premises described
4 in the complaint as the Lady of the Lake mining claim, or has at any time been or now is in the possession thereof; and the defendant denies that the plaintiff has ever owned or now owns or has ever been or now is in the possession of such portions of the premises described in the complaint, and therein called the Central and Lady of the Lake mining claims, as are embraced in the Clara mining claim, as the same is hereinafter described or — complaint. The defendant admits he claims an estate and interest adverse to the claim of the plaintiff in so much of the premises described in the complaint as is embraced in said Clara mining claim, and the defendant denies that his claim is without legal and equitable foundation or void, or that it is a cloud on plaintiff's title or an injury or damage to plaintiff — any part of such portions of the premises described in the —, or that plaintiff is greatly or at all embarrassed in the use or disposition of any mining claims belonging to it, or that any interest or property of the plaintiff is depreciated in value by reason of the alleged or any claim of defendant, or that defendant has no title or interest in that part of the premises described in the complaint embraced in said Clara mining claim.

And the defendant denies that he has made or makes any claim to or claimed any estate or interest in the premises described in the complaint, excepting only that portion thereof embraced in the Clara mining claim as the same is hereinafter described.

And the defendant alleges that before the commencement of the action he was and still is the owner in fee, under patent from the United States, and in the possession of the Clara mining claim, situate in the Blue Ledge mining district, Wasatch county, Territory of Utah, known in the official surveys as lot "39 A," and containing twenty and sixty-six one hundredths acres, and, with magnetic variation of 16° 30′ east, bounded as follows: Commencing at post No. 1, the northeasterly corner of the claim, and running thence south 4° 30′ west 600 feet to post No. 2, the southeasterly corner of the claim; thence north 85° 30′ west 1,500 feet to post No. 3, the
5 southwesterly corner of the claim; thence north 4° 30′ east 600 feet to post No. 4, the northwesterly corner of the claim, from which U. S. mineral monument No. 1, in Uintah mining district, bears north 82° 46′ west, 682½ feet distant; thence from said post No. 4 south 85° 30′ east 1,500 feet to said post No. 1, the place of beginning.

The defendant therefore prays judgment that the plaintiff's complaint may be dismissed and all relief thereby prayed denied; that the defendant have judgment for costs, and such other relief as may be proper.

BENNETT & HARKNESS,
Attorneys for Defendant.

Duly verified.
Answer filed the 29th day of October, 1880.

Stipulation of Facts.

(Title.)

Facts agreed to and considered as if fully proved by plaintiff.

1. The Central mining claim was located August 19th, 1876, and Exhibit "1" is a correct copy of the location notice.

2. The said mining claim was officially surveyed for application for patent August 2d, 1880, and application for patent soon thereafter made by the plaintiff or its grantors. In such application there was omitted from the Central mining claim the area in conflict with the Lady of the Lake mining claim, and the application was for 3.89 acres of surface ground, colored yellow on Exhibit "3."

3. The Lady of the Lake mining claim was located July 25th, 1875, and Exhibit "2" is a correct copy of the location notice.

4. Said Lady of the Lake mining claim was officially surveyed for application for patent on the 8th day of July, 1876.

5. Said mining claims and the Clara mining claim are
6 correctly represented on the annexed or accompanying map, marked Exhibit "3."

6. The Central mining claim and the Lady of the Lake mining claim, at the commencement of the action, were and still are the property of and owned by the plaintiff to the extent that the locators and their grantees could convey and give title to the same, the plaintiff having succeeded to such interest as said locators and their grantees could grant. There was no actual possession of the conflicting and disputed areas at the commencement of the action, but the plaintiff had possession in accordance with mining laws and customs of other parts of the Central and Lady of the Lake mining claims, and by virtue of such possession was also in possession of the conflict areas, if such conflict areas are rightfully a part of the Lady of the Lake and Central mining claims and not the property of the defendant under his patent for the Clara mining claim.

That the plaintiff and its grantors have done the work required by law from year to year to the commencement of this action on the said Lady of the Lake and Central mining claims, respectively.

7. The annexed copy (printed) of the by-laws of the Blue Ledge mining district, in which the premises in question are, and during all the times mentioned in this stipulation have been, situated is correct, and correctly states and shows the by-laws passed and adopted in said district and all of them and the dates when the same were adopted, respectively.

Facts agreed to and considered as if fully proved by the defendant.

1. The Clara mining claim was located June 28th, 1872, and Exhibit "A," annexed, is a correct copy of the location notice.

2. Said mining claim was officially surveyed for application for patent March 31st, 1876.

3. Application for patent under said notice and survey
7 was made in the U. S. land office at Salt Lake City, Utah, April 28th, 1876; the application included an application for the Clara mill site.

4. The Clara mining claim was entered and paid for, at said office, February 20th, 1879.

5. The patent for the Clara mining claim was granted on the 6th day of February, 1880, under said application and on said entry to the defendant, who had succeeded to the interest of the locators and their grantees, and the said claim, as patented, is correctly shown on Plaintiff's Exhibit "3." A copy of the patent may be annexed and made a part of the case in this court or on any appeal.

6. On the 27th day of June, 1876, and during the 60 days publication of the notice of application for patent for the Clara mining claim and mill site, the owners of the Lake mining claim filed in the United States land office an adverse claim against said application for patent, and thereby made an adverse claim to the areas in conflict between the Lady of the Lake mining claim and the Clara mining claim and Clara mill site.

On the 25th day of July, 1876, agreements in writing were made between the owners of the Lady of the Lake mining claim and the applicants for patent for the Clara mining claim and mill site as follows: An agreement whereby the owners of the Clara mill site relinquished their application for patent for so much thereof as conflicted with the Lady of the Lake mining claim, and the owners of the Lady of the Lake mining claim agreed, in consideration thereof, to prosecute their application for patent for said claim with diligence and when patent was obtained to convey to the owners of said mill site or their assignees the area in conflict between said mill site and said Lady of the Lake mining claim, excepting and reserving, however, to the owners of the Lady of the Lake mining claim any mineral vein or veins under the surface of said conflict area, and also the right to mine and extract any minerals therein.

And the owners of the Clara mining claim agreed not to
8 protest the application for patent for the Lady of the Lake mining claim, and at the same time the owners of the Lady of the Lake mining claim, as part of the same agreement, made and delivered to the applicants for patent for the Clara mining claim and also filed in said United States land office a written withdrawal, relinquishing their said protest and adverse claim against the application for patent for the Clara mining claim, and released to the United States and their grantees the lands and premises in conflict between the said Clara and the Lady of the Lake mining claims, the said conflict area containing forty one-hundredths of an acre, more or less.

7. That on the 4th day of May, 1872, it was known to miners of the Blue Ledge mining district that an act of Congress relating to the location and extent of mining claims upon mineral lands of the United States had passed or was about to be passed.

8. The premises in dispute, being the conflict areas between the Clara mining claim and the Lady of the Lake and Central mining claims, are of the value of more than one thousand dollars, and the area in conflict between the Central and Clara mining claims is of the value of more than one thousand dollars.

It is stipulated that the foregoing are all the facts in the case, and the case may be heard and determined thereon or on such of them as the court shall hold material and admissible in evidence, each party reserving the right to object to the materiality and competency of any of said facts as fully as he or it could do if proof thereof was offered at the hearing.

And the defendant now objects to the competency and admissibility of item 7 in plaintiff's facts and any other facts or evidence offered with a view to attack or impeach the validity of the Clara patent, on the ground that these are not the proper parties to
9 the action or any foundation laid in the pleadings or any legal or equitable ground set forth in the complaint to justify an impeachment of the patent title.

SUTHERLAND & McBRIDE, *Plaintiff's Attorneys.*
BENNETT, HARKNESS & KIRKPATRICK,
Attorneys for Defendant.

In addition to the facts heretofore agreed to, it is now stipulated and agreed that a copy of the mining laws of Blue Ledge mining district, identical with the copy in the agreed facts herein accompanied, *and* formed part of the application for patent for the Clara mining claim.

This fact may be considered as if fully proved in this court and on any appeal taken by either party.

Nov. 30, 1881.

SUTHERLAND & McBRIDE, *Attorneys for Plaintiff.*
BENNETT, HARKNESS & KIRKPATRICK,
Attorneys for Defendant.

Findings.

(Title.)

This action having been heretofore submitted to the court on the pleadings, stipulation of the parties as to the facts, and the argument of counsel, Messrs. Sutherland & McBride appearing as counsel for the plaintiff and Bennett, Harkness & Kirkpatrick as counsel for defendant, and the cause having been duly considered, the following findings of fact and conclusions of law are now made, to wit:

It is found that the facts are as stipulated by the respective parties in the stipulation now filed and the exhibits thereto attached, and said stipulation as to facts is adopted by the court as a finding

of facts; and as conclusions of law, it is found that the de-
10 fendant owns and is entitled to the possession of the areas in conflict between the Clara mining claim and the Central and and Lady of the Lake mining claims, and that the plaintiff, at the time of the commencement of the action, did not own and was not entitled to the possession of said conflict areas or any part thereof.

That the defendant is entitled to judgment in accordance with these findings, and dismissing the plaintiff's action on the merits, and for costs of suit.

Dated February 21st, 1882.

By the court:

PHILIP H. EMERSON, *Judge.*

Filed February 21st, 1882.

Judgment.

Findings of fact and conclusions of law having been made and filed herein, now, in pursuance thereof and on motion of Bennett, Harkness & Kirkpatrick, attorneys for defendant, it is now considered and adjudged that at the time of the commencement of the action the defendant was and still is the owner and entitled to the possession of the areas in conflict between the Clara mining claim and the Central and the Lady of the Lake mining claims, situated in the Blue Ledge mining district, county of Wasatch and Territory of Utah; that the plaintiff was not and is not the owner or entitled to the possession of said areas or any part thereof.

That the plaintiff's action be, and the same is, dismissed on the merits, and that the defendant have and recover of and from the plaintiff the costs and disbursements of this action, taxed at $39.00.

Dated Feb'y 21st, 1882.

By the court:

PHILIP H. EMERSON, *Judge.*

Filed February 21st, 1882.

11 *Notice of Appeal.*

Take notice that the said plaintiff appeals to the supreme court of the Territory of Utah from the judgment of said district court, rendered and entered in this action on the 21st day of February, 1882, in favor of said defendant, dismissing the complaint of said plaintiff and for costs of suit, taxed at $39.00, and from the whole of said judgment.

Yours, &c., SUTHERLAND & McBRIDE,
Plaintiff's Attorneys.

Dated March 28th, 1882.

To the clerk of said district court and Messrs. Bennett, Harkness & Kirkpatrick, defendant's attorneys.

Filed March 30th, 1882.

Undertaking on Appeal.

Whereas in the above-entitled action the plaintiff above named appeals to the supreme court of Utah Territory from a judgment rendered and entered in said action against said plaintiff and in favor of said defendant, on the 21st day of February, 1882, dismissing the complaint and for costs of suit:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, do hereby, jointly and severally, undertake and promise on the part of the appellant that the said appellant will pay all damages and costs that may be awarded the appellant on the appeal, not exceeding one hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

Witness our hands and seals this 28th day of March, 1882.

JNO. R. McBRIDE. [SEAL.]
J. G. SUTHERLAND. [SEAL.]

(Duly verified.)
Filed the 30th day of March, 1882.

12 EXHIBIT 1.

Central Mining Claim Notice.

We, the undersigned, do hereby claim and locate fifteen hundred (1,500) feet on this lead, lode, ledge, or deposit of mineral-bearing rock, with all dips, spurs, and angles, beginning at this notice or monument and running thirty-five (35) feet in a westerly direction and fourteen hundred and sixty-five (1,465) feet in an easterly direction, with one hundred feet on each side of the middle of the vein. The location is more fully described as follows, to wit: Beginning at the discovery monument, thence in a westerly direction thirty-five feet to the west end line; thence in a southerly direction one hundred feet to a post marked P. 1, C. M. C.; thence in a northerly direction two hundred (200) feet to a post marked P. 2, C. M. C.; thence in an easterly direction fifteen hundred (1,500) feet to a post marked P. 3, C. M. C.; thence in a southerly direction two hundred (200) feet to a post marked P. 4, C. M. C.; thence in a westerly direction fifteen hundred (1,500) feet to post 1, situated about two hundred (200) feet in a southwesterly direction from Frederick Reiche's log house, at what is known as Summit Lake, Uintah mining district, Summit county, Utah Territory. We claim all the rights, &c., and privileges granted by the United States mining laws and by the by-laws of said Uintah mining district, to be known as the Central mining claim, Uintah mining district, Summit county, Utah Territory.

July 26, 1876.

(Signed) GEORGE GOSS, 75 feet.
JAMES HARRINGTON, 750 feet.

Filed for record in recorder's office at a quarter to four o'clock p. m., August 19th, 1876.

W. I. MONTGOMERY,
District Recorder.

Filed and recorded this 16th day of August, at 9 o'clock a. m., 1880, Wasatch county, Utah Territory, Blue Ledge mining district.

JOHN SESSIONS,
District Recorder.

(Duly verified.)

13 *Addendum to Location Notice of Central Mining Claim.*

Notice is hereby given that the undersigned is *due* owner of the Central mining claim intended to be described in the foregoing notice of location bearing the signatures of George Goss and James Harrington; that the subscriber derives title to said claim for valuable consideration, by regular *claim* of conveyance from said Goss and Harrington; that said claim has been continuously occupied and worked by said locators and their successors in interest, including the subscriber, since the date of location, viz., July 26th, 1876; that by mistake the said claim was in said notice stated to be located and situated in Uintah mining district, and was recorded in the record of the recorder of said district, whereas the said claim was then and now is situated in Blue Ledge mining district, Wasatch county and Territory of Utah. The subscriber claims the said Central mining claim as described in said location notice, with the correction that the same is situated in Blue Ledge mining district.

Dated Aug. 12th, 1880.

PARLEY'S PARK SILVER MINING COMPANY.
J. E. KENNEDY, *Ass't Treasurer of said Company.*

Filed and recorded this 16th day of August, at half past 9 o'clock a. m., 1880, Wasatch county, Utah territory, Blue Ledge mining district.

JOHN SESSIONS,
District Recorder

Duly verified.

EXHIBIT 2.

Notice.

I, the undersigned, do hereby claim and locate fifteen — (1,500) feet on this lead, lode, or ledge of mineral-bearing rock, beginning at this notice or monument and running 400 feet in a west-
14 erly direction and (1,100) eleven hundred feet in an easterly direction, with one hundred (100) feet on each side of the middle of the vein, situated about one hundred and fifty (150) feet east of F. Reiche's log house and about four hundred feet east of the east end of Parley's Park claim and close to the divide between Summit and Blue Ledge mining districts, to be known as the Lady of the Lake of Blue Ledge mining district.

Wasatch county, Utah Territory, July 25th, 1875.

WILLIAM CLANCY, *Locator.*

Filed and recorded this 27th day of July, at 8 o'clock a. m., A. D. 1875, in the Blue Ledge mining district, Wasatch county, Utah Territory.

JOHN SESSIONS,
District Recorder.

(Duly verified.)

DEFENDANT'S EXHIBIT A.

Notice. Clara Ledge.

We, the undersigned, claim, by location under the mining laws of the United States and also the local laws of this district, (1,500) fifteen hundred feet on this ledge or lode of mineral-bearing rock, and also (300) three hundred feet on either side, with all dips, spurs, and angles, running in a northeasterly direction by southwesterly. We claim (300) three hundred feet easterly and twelve hundred feet westerly from this notice, situated about two thousand feet westerly from the McHenry mine and about six hundred feet south from the main gulch, and known as the Clara Ledge, located June 28th, 1872.

Blue Ledge mining district, Wasatch county, Utah Territory.

J. W. SNYDER, 375.
F. REICHE & CO., 1,125.

Filed for record Thursday, at 5 o'clock p. m., July 11th, 1872, Blue Ledge mining district.

W. H. WALKER,
Deputy Recorder.

15 & 16 Recorded on pages 104 and 105, Book C, July 15th, 1872.

JOHN GALLAGHER,
County Recorder.

Copied and recorded in Book D, August 16th, 1873, Blue Ledge mining district.

JIM SNYDER,
District Recorder.

(Duly verified.)

On Appeal.

(Title of court and cause.)

It is stipulated that the foregoing transcript on appeal is correct and complete, save and except the map, "Exhibit 3," referred to in statement of facts, and the copy of "Laws of Blue Ledge Mining District;" and it is *argued* that these exhibits, filed in the district court, may be used on the hearing of this appeal or any other appeal in the cause without being formally made or printed in the transcript on record.

April 12th, 1882.

SUTHERLAND & McBRIDE,
Attorneys for Plaintiff.
BENNETT, HARKNESS & KIRKPATRICK,
Attorneys for Defendant.

17 *All the By-Laws of Blue Ledge Mining District, Wasatch County, Utah Territory, July 19th, 1876.*

18 By-laws of Blue Ledge mining district, Wasatch county, Utah.

Minutes of a meeting held at the house of William J. Gallagher, in Heber City, on the 13th day of April, 1870, to organize a mining district in Wasatch county, Utah Territory.

The meeting was called to order. It was moved and seconded that Richard Sessions be chairman. Carried. Moved and seconded that John Gallagher act as secretary. Carried. Moved and seconded that we organize a mining district—carried—to be bounded as follows: Commencing at Richard Session's cold spring, running due west to the first canyon; thence up said canyon to the top of the ridge, striking the Wasatch county line; thence following said line of Wasatch and Summit counties in a northeasterly direction to the Wasatch county road; thence south along said road to the place of beginning—to be known as the Blue Ledge mining district. Moved and seconded that John Gallagher be recorder of the aforesaid mining district. Carried. Meeting adjourned.

Minutes of a meeting of miners held in the Blue Ledge mining district, on the lode that is known as the Scottish Chief lode, on the 10th day of May, 1870, at about 10 o'clock a. m.

On motion of R. McKnight, R. W. Glenn be chairman of the meeting. Motion seconded and carried.

19 The minutes of the miners' meeting held at the house of William J. Gallagher on the 13th of April, 1870, *was* then accepted.

On motion of John Gallagher, a committee of three appointed to draft by-laws to govern the Blue Ledge mining district. Seconded and carried.

Moved and seconded that R. W. Glenn, M. Hurness, and William Freeman be said committee. Carried.

Miners' meeting held on the 17th day of May, 1879, in Heber City.

Meeting was called to order by R. W. Glenn, chairman, when the following by-laws were presented and adopted:

SEC. 1. Any person discovering a ledge or lode of mineral shall be entitled to 200 feet for discovery and 200 feet as a location, making in all 400 feet. Said person so discovering any ledge or lode may, with others, take up and claim 3,000 feet, provided that said company does not consist of more than fourteen persons.

SEC. 2. When any ledge or lode has been discovered by any person or company it shall be the privilege of any person or company to make an extension on said lode or ledge and claim the same amount of feet as specified in article 1st.

SEC. 3. No person can claim or hold more than 200 feet in any ledge or lode, except he hold the same by deed, except the discoverer.

SEC. 4. The surface width of any mining location shall not exceed 100 feet in width on each side the wall rocks of said lode.

SEC. 5. When any person or company shall discover a ledge or lode in this mining district he shall post a notice on some given points of the ledge designating which way his or their claim extends, the name of the lode, by whom discovered, and when located, the amount of feet claimed, and in what part of the district it is situated in.

SEC. 6. All claims shall be filed for record within ten days of their location, unless held by constant labor thereon.

SEC. 7. Any person or company locating a claim as provided by these laws shall perform twenty dollars' worth of labor thereon each year, or else it shall be considered abandoned.

SEC. 8. The by-laws of said district may be revised or amended at any regular meeting that may be called by ten or more *bona fide* claimholders in said district.

Moved and seconded that we adjourn *sine die*.

R. W. GLENN,
M. HURNESS,
WM. FREEMAN,
Committee on By-Laws.
JOHN GALLAGHER,
District Recorder.

Minutes of a miner's meeting held at John Gallagher's, Heber City post office, Saturday evening, May 4th, 1872, to alter and amend the laws of the Blue Ledge mining district.

The meeting was called to order, and on motion of Wm. H. Walker, seconded by Thomas Rasband, that J. H. Giles be chairman of said meeting. Carried.

Moved by W. H. Walker and seconded by John Jordan that John Gallagher be re-elected district recorder of the Blue Ledge mining district.

The following laws were then presented, taken from the Little Cottonwood and East Canyon mining districts, and each separate section voted upon and adopted:

SEC. 1. This mining district shall remain and be known as the Blue Ledge mining district, which shall be bounded as prescribed in the original minutes of a meeting held at the house of Wm. J. Gallagher on the 13th day of April, 1870.

SEC. 2. There shall — an officer for said mining district, to be called the recorder, who shall be elected on the first Saturday in May by the miners of this district at their annual meeting.

SEC. 3. The recorder shall procure and keep a substantial bound book, to be called the Book of Locations, in which he shall record all notices of location claims, whether for mining or other purposes connected therewith.

SEC. 4. He shall carefully preserve and keep all papers filed with him for record and deliver them up on proper demand to the person or persons entitled to receive the same, and faithfully do and perform all other acts and duties required of him by these laws.

SEC. 5. The recorder shall hold office for one year or until his successor is duly elected: Provided, however, That he may be
21 removed at any time for misconduct in office or neglect of his duty, as prescribed by the laws of this district.

SEC. 6. The record books may be kept in Heber City unless called for by the miners of the Blue Ledge mining district, and shall be kept open during all business hours for examination and inspection.

SEC. 7. The recorder may appoint a deputy under him, for whose official acts he shall be held responsible.

SEC. 8. He shall note upon the back of each notice of location or other instrument filed with him for record the day and hour of the filing thereof, and said instrument shall be deemed recorded from and after the date of such filing for record.

SEC. 9. When a claim shall have been located and recorded he shall, upon request, make out and deliver to the claimant, his agent or attorney, a certificate of such location and record of his official signature, which certificate shall be evidence of the facts therein stated.

SEC. 10. All examinations of the record book must be made in the presence of the recorder or his deputy, and when his term of office expires the recorder shall turn over to his successor all books, papers, and other property pertaining to his office.

SEC. 11. The recorder shall be authorized to demand fees, to wit, for each vein or lode recorded by any person or company of persons, $2; for each claim otherwise recorded, 50 cts.; for each official certificate, 50 cts.; for each deed, power of attorney, or bill of sale, $1; and he shall be allowed 50 cts. per mile going to each claim him or his deputy visits.

SEC. 12. All claims shall be filed for record within thirty days of the location. Notice shall be marked as follows: On a monument of stone not less than two feet high or upon a stake three inches through and two feet high above the ground. Such notice shall designate the name of the lode and the amount of feet claimed by locator or locators of the ledge, unless the parties shall hold the same by constant labor thereon.

SEC. 13. In making a record of the location of any claim the same shall be definitely described with reference to some artificial or natural monument. Each lode shall be represented every year by twenty-five dollars' worth of labor actually performed thereon; otherwise it will be considered abandoned, and will be open for
22 relocation, unless it can be shown to the satisfaction of the recorder that one thousand dollars' worth of labor has been performed or a patent taken out for the same. In case of any dispute arising in regard to the amount of labor performed, each party shall have the privilege of choosing a referee or a disinterested miner, which two referees that are chosen and cannot agree shall have power to call a third, which shall decide the case.

SEC. 14. Any person or persons making a location shall definitely describe to the recorder or his deputy, as nigh as possible, what part of the district his or their location may be found. The surface width shall be governed by laws of the U. S. A.

SEC. 15. Any person or persons may locate a tunnel by posting at the point of commencement a notice such as is required in the location of a vein or lode, specifying the name of said tunnel and the name of the person or persons claiming the right of said tunnel; also the course such tunnel is intended to run, the lode or lodes it is intended to work, and by filing for record a similar notice with the recorder or his deputy. Labor shall be performed thereon the same as required for holding a lode.

SEC. 16. No person shall be entitled to vote at any miners' meeting of this district unless he owns a *bona fide* interest in a mining claim in this mining district.

SEC. 17. The by-laws of this mining district may be revised or amended at any regular meeting that may be called by thirty or more *bona fide* claimholders in the aforesaid mining district.

SEC. 18. Thirty days' notice shall be given in writing. Such notices shall be issued by the recorder and posted in five separate places in the district previous to any meeting for a revision of the laws, and all meetings shall be called in the same manner.

SEC. 19. All laws or parts of laws in this district conflicting with these laws or any of the mining laws of the United States are hereby repealed.

I do hereby certify that the above is a true and correct copy of the Blue Ledge mining laws.

THOS. H. GILES,
Chairman of the Meeting.
JOHN GALLAGHER,
District Recorder.
WM. H. WALKER, *Deputy.*

23 In pursuance of motion of meeting of July the 10th, 1872, the meeting of July 25th was called to order by W. H. Walker. R. W. Glenn was elected chairman, and L. C. Kerrick secretary.

On motion of C. B. Nugent—carried—that all the ground covered by the districts known as the Blue Ledge, Howland, and White Pine be consolidated, and that all records made previous to this date in the said districts be by this meeting declared valid through Mr. Walker, deputy recorder. Mr. Gallagher's resignation was accepted.

On motion of John McNeal—carried—that a committee of three be appointed by the chairman to revise the by-laws of Blue Ledge district, and wherever they conflict with the United States laws to amend the same, and the balance to be accepted to define the boundaries of this district.

Moved and carried that this district be named the Blue Ledge district.

Committee as appointed to define boundaries and draft by-laws, W. H. Walker, R. Kamp, and T. H. Giles.

On motion of C. B. Nugent, 100 feet each side of centre of vein was adopted. Carried.

On motion of W. Toibe, must record within ten days from location. Carried.

SEC. 1. This mining district shall be known as the Blue Ledge

district and be bounded as follows: Commencing at the top of the summit, where the Wasatch county road crosses the summit into Parley's Park, thence following said road southerly to Provo river; thence down said river to the Snake Creek mining district line; thence westerly along said line to the Wasatch county line; thence northerly along said line to the point of beginning.

SEC. 2. There shall be an officer for said mining district, to be called the recorder, who shall be elected on the 4th Thursday of July by the miners of said district at their annual meeting.

Third, fourth, and fifth sections accepted.

SEC. 6. The record books shall be kept within the limits of the Blue Ledge mining district, and shall be kept open during all business hours for examination and inspection.

Sections seventh, eighth, and ninth accepted.

SEC. 10. It shall be the duty of the recorder or his deputy to visit all locations, mining claims, or other claims for milling or building purposes before making a record of the same. No claim of any kind shall be recorded that is in dispute by different parties, and
24 when a dispute has arisen over any claim each party shall have the privilege of choosing a disinterested miner, which referee, if not agreed, shall call a third, which shall decide the case.

SEC. 11. The surface of this miners' district shall not exceed 100 feet from the center of the vein or lode, and all mining claims heretofore discovered shall be monumented so as to plainly define the claim located by the party or parties discovering the same.

Sections twelve and thirteen accepted.

SEC. 14. All claims shall be filed for record within twenty days of location notice; $100 worth of labor performed thereon each year, unless it can be shown to the satisfaction of the recorder or his deputy that $500 worth of labor has actually been performed thereon or a patent taken out for the same.

SEC. 15. All tunnel locations shall be governed by the laws of the United States as regards monumenting and feet claimed and the amount of labor performed thereon to hold the same, and shall be filed for record within thirty days of their location notice.

Sections sixteen, seventeen, eighteen, and nineteen accepted.

Meeting of the miners of Blue Ledge mining district, held at Reich's Hotel Sept. 10th, 1872, at half past nine o'clock.

Meeting called to order by C. B. Nugent, recorder.

Motioned and seconded that Edmond Richardson act as chairman. Carried.

Motioned and seconded that R. C. Camp act as secretary.

Moved by Mr. Nugent and second- by B. A. Morris that the seventeenth section be made to read thirty miners instead of ten. Carried.

Motion by Joseph Murdock and seconded by B. A. Morris that the nineteenth section be made to read thirty days instead of ten; also that not less than five notices be posted in the most prominent or conspicuous places in said district. Carried.

Motioned by Mr. Nugent, second- by John Cook, that the eight-

eenth section be made to read the recorder, leaving out the word deputy. Carried.

Motioned by B. A. Morris and second- by Joseph Murdock, that section fourteen be amended to read twenty days for locating instead of ten. Carried.

25 Moved by S. C. Perry, second- by B. A. Morris, that these amendments be in force after the close of this meeting. Carried.

Motioned by John Crooks, second- by Nugent, that these laws be published in the Mining Journal. Carried.

Motioned by Nugent, second- by Morris, that the meeting adjourn *sine die*. Carried.

EDMUND RICHARDSON, *Chairman*.

Minutes of meeting held by the miners of Blue Ledge district, held at Recorder Nugent's office July 25th, 1873.

On motion of J. W. Snyder, C. B. Nugent was elected chairman.

On motion of J. W. Snyder, John Hughs was elected secretary.

On motion of J. W. Snyder, the by-laws were read by secretary.

On motion of J. W. Snyder, it was moved and carried that twenty-five dollars' worth of labor be done on all locations within thirty days after date of locations.

On motion of J. W. Snyder, it was moved and carried that these laws be enforced until revised.

On motion of John W. Hughs, it was moved and carried that J. W. Snyder be elected recorder of Blue Ledge mining district for the coming year or until removed.

On motion of B. A. Morris, moved and carried that the meeting adjourn *sine die*.

Minutes of a meeting held by the miners of Blue Ledge mining district, held at the recorder's office July 25th, 1874.

On motion of W. B. Sessions, Hiram Oaks was elected chairman.

On motion of W. B. Sessions, D. A. Sessions was elected secretary.

On motion of W. B. Sessions, it was moved and carried that John Sessions be elected recorder of the Blue Ledge mining district for the coming year or until removed.

On motion of Hiram Oaks and seconded by D. A. Sessions, that there be an amendment on the sixth section of the district

26 law that in case the recorder should have business that would require him to be away from the district for a time let the records be deposited with the county recorder.

On motion of W. B. Sessions, moved and carried that the annual meeting be on the fourth Thursday of July instead of the 25th inst.

On motion of John Sessions, moved and carried that the meeting adjourn *sine die*.

HIRAM OAKS, *Chairman*.

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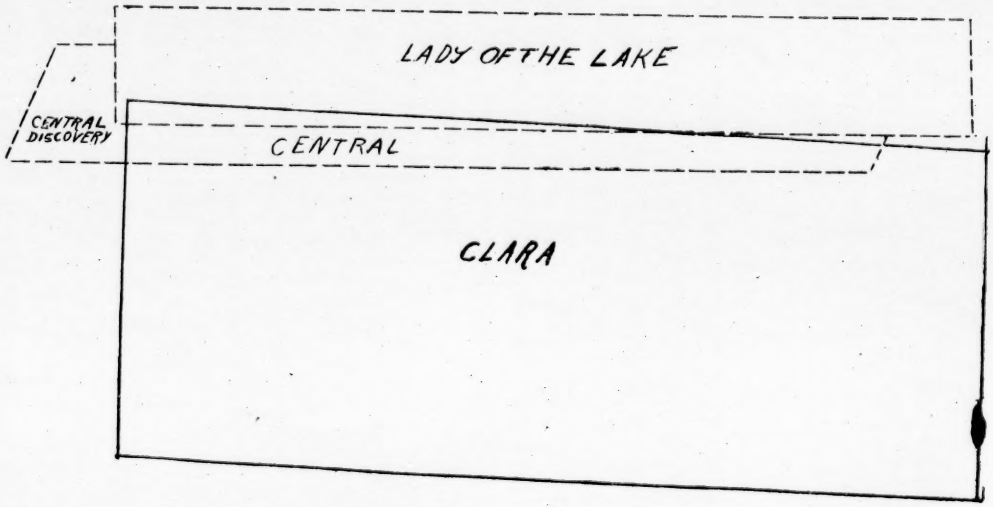
Map Exhibit. 3.

No. 154.
Parley's Park
Silver Mfg. Co.
v.
John W. Kerr.
} p. 24.



Minutes of a miners' meeting held at Sessions Camp, Blue Ledge mining district, by the miners July 22d, at 12 o'clock, 1875.

Meeting called to order by John Sessions, recorder.

By motion W. Whipple was elected chairman.

Motioned and seconded that James Jackson be elected secretary.

John Sessions was elected recorder from July 22d, 1875, till July 22d, 1876.

The recorder's book is to be kept within the district while there is three miners within it.

Motioned and seconded that this meeting be adjourned *sine die*. Carried.

JAMES JACKSON, *Secretary*.
WILLIAM WHIPPLE, *Chairman*.

I, John Sessions, district recorder of Blue Ledge mining district, situated in Wasatch county, Utah Territory, do hereby certify that the foregoing is a true, full, and correct copy of the by-laws of said mining district as appears upon the books of record of said mining district.

JOHN SESSIONS,
District Recorder.

Sworn and subscribed to before me, a notary public in and for the county of Summit and Territory of Utah, this third day of April, 1876.

W. J. MONTGOMERY,
Notary Public.

(Here follows diagram marked p. 27.)

28 THURSDAY, *June 8th, A. D.* 1882.

A session of the supreme court of Utah Territory was held this day.

* * * * * * *

PARLEY'S PARK SILVER MINING CO., Appellant,

vs.

JOHN W. KERR, Respondent.

From 1st dist.

By agreement of respective parties, this cause is submitted on briefs and taken under advisement, Mr. Sutherland to file additional brief if he desire.

SATURDAY, *February 3d, A. D.* 1883.

* * * * * * *

PARLEY'S PARK SILVER MINING COMPANY, Appellant,

vs.

JOHN W. KERR, Respondent.

From 1st dist.

This cause having been submitted at a former term of this court and the court being now sufficiently advised thereon, it is ordered and adjudged that the judgment of the district court therein
29 be, and the same is hereby, affirmed, and that respondent have and recover of and from appellant twenty-eight & $\frac{80}{100}$ dollars costs.

TUESDAY, *January 20th, A. D.* 1885.

* * * * * * *

PARLEY'S PARK SILVER MINING COMPANY, Appellant,

vs.

JOHN W. KERR, Respondent.

From 1st district.

Said appellant, by its counsel, prayed the allowance of an appeal from the judgment rendered in this cause the 3d day of February, 1883, to the Supreme Court of the United States, and asked that the amount of a bond to be given thereon be now fixed; whereupon, counsel of respondent being present and not objecting, it is now ordered that the appeal so prayed be and is allowed and the amount of such bond be and is fixed at $500.00.

30 *Opinion.*

In Supreme Court, Utah Territory.

PARLEY'S PARK S. M. CO. *vs.* JOHN W. KERR.

EMERSON, *J.:*

This is an action under section 254 of the practice act. The complaint is in the most general terms, and simply avers that the respondent claims some interest or estate in the premises in controversy, or some part thereof, adverse to the appellants, which interest or claim, it is averred on information and belief, is without any legal or equitable foundation and void, and that it is a cloud upon its title, etc., the usual formal allegations. The respondent pleads and the agreed facts show a patent to him from the United States including the ground in controversy. In view of the facts set out in the agreed statement, the most that can be said as against this patent is that it is voidable and not void. Passing by the question whether an action can be maintained to set aside a voidable
31 patent granted by the United States without making it a party, this complaint is insufficient to authorize the admission of evidence attacking the validity of the patent or to sustain

a judgment or decree of the court annulling it. Such a decree could not be in accordance with any specific relief demanded by the appellant, and could not be included in the general clause for relief, under section 149 of the practice act, as it would not be consistent with the case made by the complaint or embraced in the issues.

Counsel for the appellant say in their brief that "the object of the suit is to have an adverse claim annulled." The adverse claim is shown to be based upon a patent title from the Government. No objection is made that the patent is void upon its face or otherwise informal. The Government certainly had the title. The patent is not unauthorized or prohibited by any law and is between
32 competent parties, and is voidable only in equity for some mistake, fraud, or misrepresentation practiced upon the Government. Kohn *v.* Old Telegraph M. Co., 2 Utah, 174. Granting that this may be done without making the party defrauded, the Government, a party to the action, the acts of fraud, misrepresentation, and the like must be specified in the complaint or it will not state facts sufficient to constitute a cause of action. Semple *vs.* Hagar, 27 Cal., 163. As the other members of the court are not prepared to pass upon the remaining point raised on the appeal and as the one discussed is decisive of the case, the judgment of the lower court dismissing the action is affirmed.

Hunter, C. J., and Teviss, J., concurred.

Endorsed: Filed February 24, 1883. E. T. Sprague, clerk.

33 *Assignment of Errors and Prayer for Reversal.*

The Supreme Court of the United States.

PARLEY'S PARK SILVER MINING COMPANY, Appellants,

vs.

JOHN W. KERR, Appellee.

Now comes the appellant above named and upon the record and proceedings of the supreme court of Utah Territory assigns the following errors:

That the court below erred in holding that the patent under which the defendant claimed title to the premises was not void, it appearing from the facts agreed to in the record that said patent was issued without authority and under circumstances which make it void.

The court below erred in holding that the complaint did not show a right of action in the plaintiff, the facts showing that the plaintiff was the equitable owner of the property sued for, and that the pretended patent under which the defendant claimed
34 was issued to him without authority of law.

The court erred in entering its decree in favor of the defendant, it appearing that the plaintiff was entitled on the facts in the record to a judgment for the premises sought to be recovered.

Wherefore the appellant prays for a reversal of the decree in this cause and for a decree accordingly.

J. G. SUTHERLAND,
JNO. R. McBRIDE,
Sol'rs for Appellant.

Endorsed: Parley's Park Silver Mining Company *vs.* John W. Kerr. Filed February 27th, 1885. E. T. Sprague, clerk.

35 Know all men by these presents that we, John S. Scott and James Anderson, of Salt Lake county, in the Territory of Utah, are held and firmly bound unto John W. Kerr, his heirs and assigns, in the just and full sum of five hundred dollars, lawful money of the United States, to be paid to the said John W. Kerr, his heirs or assigns; to which payment, well and truly to be made, we hereby bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 30th day of January, A. D. 1885.

The condition of the above obligation is such that whereas lately, at a term of the supreme court for the Territory of Utah, in a suit pending in said court between the Parley's Park Silver Mining Company, a corporation, as plaintiff, and John W. Kerr, as defendant, a final judgment was rendered and entered dismissing said action and for sixty-three $\frac{50}{100}$ dollars costs, and affirming the judg-
36 ment of the district court therein of the third judicial district of Utah Territory; and the said plaintiff being desirous to and having taken its appeal from said judgment of said supreme court, and said appeal having been allowed in open court, in the presence of the counsel of the said defendant, and the amount of the bond to be given fixed at the sum of five hundred dollars:

Now, therefore, if the said appellant shall prosecute its said appeal to effect and answer all damages and costs thereon, and pay or cause to be paid to the said John W. Kerr, his heirs or assigns, the amount of any judgment which may be entered in said Supreme Court of the United States in case said appeal shall not be made good therein and all damages awarded therein to said appellee, or in case said appeal shall be dismissed, then this obligation to be void; otherwise to be and remain in full force and virtue.

37 Witness our hands and seals, affixed this the 30th day of January, A. D. 1885.

JOHN S. SCOTT. [SEAL.]
JAMES ANDERSON. [SEAL.]

Witness:
JOHN R. McBRIDE.

I hereby approve the foregoing bond on appeal to the Supreme Court of the United States and certify that the same is good and sufficient.

C. S. LANE,
Chief Justice of the Territory of Utah.

Endorsed: Filed February 27, 1885. E. T. Sprague, clerk.

38 Know all men by these presents that we, John S. Scott and James Anderson, of Salt Lake county, in the Territory of Utah, are held and firmly bound unto James H. McKenney, clerk of the Supreme Court of the United States, in the just and full sum of two hundred dollars, lawful money of the United States; for the payment of which, well and truly to be made to the said James H. McKenney, his heirs or assigns, we do hereby bind ourselves, our heirs, executors, & administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 30th day of January, A. D. 1885.

Whereas lately, at a term of the supreme court of the Territory of Utah, in a suit pending in said court between the Parley's Park Silver Mining Company as plaintiff and John W. Kerr as defendant, a judgment was rendered affirming a judgment theretofore entered in the district court of the third judicial district in said action dismissing the same, and for costs in favor of said defendant in
39 the sum of two hundred dollars, and the said plaintiff having in open court, in the supreme court of said Territory, on the — day of January, 1885, in the presence of the counsel for said defendant, prayed an appeal from the judgment and decree aforesaid to the Supreme Court of the United States, and the same having been allowed and the bond to the said defendant in said appeal been fixed and the same having been duly given:

Now, therefore, the condition of this obligation is such that if the said appellant shall well and truly pay or cause to be paid to the said James H. McKenney, his heirs or legal representatives, all such fees and costs as shall accrue to him as clerk aforesaid and charg-able to the said appellant in the prosecution of said appeal, then the above obligation to be void; otherwise to be and remain in full force and effect.

In witness whereof we have hereunto set our hands and affixed our seals this the 30 day of January, A. D. 1885.

JOHN S. SCOTT. [SEAL.]
JAMES ANDERSON. [SEAL.]

Witness:
JNO. R. McBRIDE.

Endorsed: Filed February 27th, 1885. E. T. Sprague, clerk.

40 TERRITORY OF UTAH, }
County of Salt Lake, } *ss*:

I, E. T. Sprague, clerk of the supreme court of said Territory of Utah, in pursuance of an appeal allowed by said court, do return herewith a transcript of the record and proceedings, opinion, bonds on appeal, and assignment of errors, all of and in said court and in the cause in which said appeal was allowed, to the Supreme Court of the United States; and I hereby certify that said attached transcript of said record and proceedings, opinion, bonds on appeal,

and assignment of errors is a true, full, correct, and complete copy of the several originals thereof on file or of record in my office.

In witness whereof I hereunto set my hand and the seal of said supreme court of Utah Territory *of Utah* this 28th day of September, 1885, at Salt Lake City.

[Seal of Supreme Court, Territory of Utah, United States of America.]

E. T. SPRAGUE,
Clerk of Supreme Court.

Endorsed on cover: Utah Territory sup. court. No. 154. Parley's Park Silver Mining Company, appellant, *vs.* John W. Kerr. Filed October 19, 1885.

Office. Supreme Court U. S.
FILED
NOV 9 1896
JAMES H. McKENNEY,
CLERK

—IN THE—

SUPREME COURT OF THE UNITED STATES.

PARLEY'S PARK SILVER MINING CO., Appellant,

vs.

JOHN W. KERR, Appellee.

APPELLANT'S BRIEF.

J. G. SUTHERLAND,
J. R. McBRIDE,
Attorneys for Appellant.

Kelly & Co., Printers.

and assignment of errors is a true, full, correct, and complete copy of the several originals thereof on file or of record in my office.

In witness whereof I hereunto set my hand and the seal of said supreme court of Utah Territory *of Utah* this 28th day of September, 1885, at Salt Lake City.

[Seal of Supreme Court, Territory of Utah, United States of America.]

E. T. SPRAGUE,
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——In the——

SUPREME COURT OF THE UNITED STATES.

PARLEY'S PARK SILVER MINING CO., Appellant,

vs.

JOHN W. KERR, Appellee.

APPELLANT'S BRIEF.

The plaintiff in this action and appellant has brought this suit to establish its possessory title to a parcel of mining ground situated in Blue Ledge Mining District, Wasatch County, Utah Territory.

Section 1479 (Compiled Laws of Utah, 1876) being Sec. 254 of the Practice Act, in force at the date of the commencement of this action, reads as follows:

"Section 254. An action may be brought by any person in possession by himself or his tenant, of real property, against any person who claims an estate or interest therein adverse to him, for the purpose ot determining such adverse claim, estate or interest."

The complaint in this action was framed to meet the requirements of that section. The plaintiff alleges that it is the owner of the ground in dispute, and has possession thereof, describing it particularly by metes and bounds—and alleges that

the defendant claims some estate or interest in the premises, adverse to the plaintiff, which it is averred is without any legal or equitable foundation and void—that such adverse claim is adverse on plaintiff's title, embarasses it, in its use and disposition, depréciates its value; and it therefore prays that the defendant may be required to set forth his adverse claim, that the same may be adjudged by the decree, and that it be declared that he has no estate or interest in the premises, and that the plaintiff's title may be deemed valid.

The defendant, by answer, took issue on the plaintiff's allegations by denials, and then sets forth his alleged adverse claim, basing the same on a patent derived from the United States, embracing among other lands besides the portion in controversy and disclaims all or any other title thereto.

The issue being made on the respective titles, the parties present their proofs in the agreed statement of facts found in the printed record, (see Transcript) commencing on p. 4 and closing on p. 17. There is an error in the date of certain by-laws referred to in the stipulation of counsel as dated May 5th, 1872. The correct date is May 4th, 1872. The counsel agree to this correction. From this statement of facts which is incorporated in the findings, it is conceded:

That the plaintiff is by location and work in accordance with the laws of the United States and the local laws of the district, the owner of the premises, unless the defendant became the owner by virtue of the patent to the Clara mining claim, which embraces the disputed, and other adjoining ground.

The entire issue is embraced in two propositions, viz: Is the complaint sufficient to authorize any examination into the validity of the Clara patent, so far as it affects the premises in controversy, and if so—is that patent valid as against the attack made upon it? The appellant insists that for the purpose of determining its own claim to the premises, and to authorize the court to declare the defendant's asserted title invalid and void as against its title, the complaint contains all that is required. This is not a case where we seek to have the defendant declared to be our trustee, and to compel him to convey to us a title to which we have the right as having been improperly obtained by him; but it is a case where we rest on our own superior title,

and ask that his pretended title be declared a nullity. We wholly deny that the defendant has the "legal or equitable" title, or title of any kind, aver that the title is in us, and only desire that his pretended title shall be annulled and declared void as against the only and true title. If the Clara patent was void and conveyed no title, if there was no authority to issue it, then the fee is in the United States and the true equitable title in the plaintiff, for there is no dispute that the plaintiff has in all respects fully complied with all the requirements of the law to entitle it to the premises.

The purpose of the action appears to have been misconceived by both the counsel for defendant and the court on the trial below.

In the brief of counsel before the Supreme Court of Utah, it was said that the complaint in this case was insufficient, "where the plaintiff intends to charge the defendant is a trustee, and must get a conveyance of the title held by the defendant before he is invested with a better title," and it was further argued that "it is necessary, in order to set aside a patent for fraud or mistake, to plead the facts separately and ask the proper relief in order that the land may be again conveyed by the United States; and if it is sought to charge the defendant as trustee of the real title, the facts should be specially stated and a conveyance asked." Following this line of argument the court below (see Opinion, p. 18 of the Record) observed: "This complaint is insufficient to authorize the admission of evidence attacking the validity of the patent, or to sustain a judgment or decree annulling it." Other points of the opinion fully disclose the fact that relief was denied the plaintiff upon the view suggested.

While we concede that there is a large and well-known class of cases, requiring, before the court will permit a patent to be attacked, without a full statemeut in the complaint of all the facts and circumstances relied upon to avoid it; this is not one of that class, and belongs to another equally well known to the courts, where redress may be had in the form here asked by the plaintiff. In the first place, we did not ask that the defendant be declared trustee for the plaintiff, nor in any way do we concede the validity of the pretended patent. On the contrary, we con-

tend that this patent, when the law existing in that district is applied to it, is void on its face—it was issued not only without authority of law, but in defiance of a plain local regulation having the force of public statute and is void for want of power in the officers to do the act. A void patent is no patent—it is worthless, null, conveys no title, and has no validity either in law or equity. It has been held by this court in many cases, that whenever a grant appears to have been issued without authority of law or power in the officers issuing it, or in a case where the State has not the title, the grant is not voidable, but absolutely void.

In the celebrated case of Polks Lessee vs. Wendall, et al, (9 Cranch, p. 99) Chief Justice Marshall, when the party had offered to show by proof that the patent had been issued without authority, held the failure to receive the proof, in a court of law, to be erroneous. After observing upon the class of cases which a court of equity should only investigate upon full allegations of all the facts, he said:

"But there are cases in which a grant is absolutely void, as when the State has no title to the thing granted, or where the officer had no authority to issue the grant." This statement of the law was very vehemently contested in subsequent cases in this court, but was maintained without qualification, (see Polks Lessee vs. Wendall, 5 Wheat., 293, and Pattteson vs. Winn, 11 Wheat., 380.) These cases have been followed by a series of decisions by this court, fully affirming and supporting them.

Winter vs. Cremmelin, 18 How., 87.
Swayzey vs. Burkel, 12 Pet., 23.
Stoddard vs. Chambers, 2 How., 284.
Easton vs. Salisbury, 21 How., 126:
O'Brien vs. Perry, 1 Black., 109.
Sherman vs. Buick, 93 U. S., 216.
Smelting Co. vs. Kemp, 104 U. S., pps. 643-4-5-6.

These cases establish, as we claim, the principle that a want of power to make the grant, when shown by proof, is a complete answer to the grant which is interposed as title. If these authorities apply to this case they are conclusive in the appellant's favor.

Let us see if they do apply.

The plaintiff's location under the mining laws and in accordance with local regulations having the force of statute is uncontested. The only question is, whether the location upon which the Clara patent was issued, appropriated the land, for if it did not the plaintiff's location did appropriate it, and its title is good—and the title having been issued to defendant without authority, void.

Section 2319 Revised Statutes of the United States, enacts that the mineral lands of the United States shall be open to exploration and purchase by its citizens and those who have declared their intention to become such, under regulations prescribed by law and according to the local customs or rules of miners in the several mining districts, these customs being not inconsistent with the laws of the United States.

Section 2320 provides that after the date of the enactment, (May 10, 1872) a mining claim shall be not more than 1,500 feet in length, and shall not be more than 600 feet, or less than 50 feet in width on the surface, but remitting the subject of the width within the limitations to the local rules and regulations of the district in which the location is made.

Section 2322 provides that so long as the locator complies with the laws of the United States and the local regulations of the district governing his possessory title, he shall have the exclusive right to the possession and enjoyment of the premises. The claimant is required to perform not less than $100 worth of labor in the development of his location each year, and show compliance with local rules and regulations, and his possession is to him a perfect possessory title; no patent is required in order to protect his rights. A compliance with these requirements insures him protection against all subsequent claimants.

Now this being the law, the defendant claims in virtue of a location made in June, 1872, and of the patent issued thereon, which he sets up as a defense in this case; and the case must turn either upon the unassailable character of the patent, or upon the validity of the location on which it is based.

The appellee's first contention, and the one which was sustained by the decision of the Utah Supreme Court, is that the patent is not assailable in this action. If, as we contend, this

patent was issued without authority of law and is void—not voidable only—then the court below erred in its ruling. If the law applicable to the locality—Blue Ledge Mining District—did not authorize the issuance of any patent to a mining claim 600 feet in width, then this patent is invalid, and is no defense to our action.

The miners in each mining district in the United States were authorized to fix the width of all mining locations in their districts as is here shown by reference to the statutes cited: Sec. 2319, 2320, 2322, Rev. Stat. These provisions required the claim to have fixed limits to be "marked on the ground," (Sec. 2324 Rev. Stat.) The statute remitted the matter of the size of the claim to the miners themselves, subject to the limitations of 1,500 feet in length and 300 feet in width, measured from the centre of the vein each way, 600 in all. The width is left to local control, except that it must be *fixed and certain*, and shall in no case exceed 600 feet, or be less than 50 feet in width.

The miners in Blue Ledge Mining District, where these premises are situate, have in compliance with the law then existing, made local rules and regulations, and these are admitted to be as found in this record, beginning on page 11 and closing on page 17 of the Transcript. They were in full force at the date of this Clara location, and the entire code of the district down to the time of this controversy is contained in this record. These regulations fixed the width of mining claims at 200 feet. It is well known that in many districts prior to the date of these regulations the width of claims was fifty feet, one hundred feet being perhaps the most common in the mining regions, while 200 feet was perhaps the greatest width allowed by miners anywhere prior to the act of 1872, which authorized them to be fixed by the miners at 600 feet width.

There is no dispute that the miners of the district had the power to fix the width of locations, nor is there any dispute that they had exercised that power. Sec. 4 of the local regulations (p. 12 of this Transcript) provided that "the surface width of any mining location shall not exceed 100 feet in width on each side the wall rocks of said lode." The phrase "the *wall rocks* of said lode" has been construed by the Supreme Court of Utah (Campbell vs. Taylor) to mean from the middle of the vein or

lode, or from the centre line of the parallelogram constituting the claim. Obviously this must be the interpretation, for the width of a claim cannot be determined by the varying width of the ore vein it contains, and besides the act of Congress requires the width not only to be fixed and definite, but to be "marked on the ground and to be measured from the *centre of the vein.*" An attempt to have the width adapted to the sinuosities, swells and contractions of a vein would be a violation of the act of Congress and invalid. If a claim was to be so elastic in its boundaries as to stretch it to a thousand feet in one portion and contract it to fifty feet in another it would be impossible to adjust boundaries and surveys, and marking on the surface would be impossible. No attempt to construe this rule in this way has ever been in practice by miners or by the courts, to our knowledge, and it would be to make it au absurdity to do so.

The argument put forward in the court below, that a lode may be fifty or a hundred, or several hundred feet between "wall rocks," which space must be excluded in computing the width of the claim, would be a nullification of the provision of Sec. 2320 of the Revised Statutes, which requires that the width shall be ascertained from "the *middle of the vein* at the *surface.*" The object of the act of Congress was to have a uniform width in each mining district, while this construction would defeat that purpose by making claims of different widths, not only of different claims, but in the same.

We take it there is no force in this suggestion.

We are met with another suggestion in favor of the appellee, that on the 4th of May, 1872, the miners of Blue Ledge District, held a meeting, at which they resolved, (See Transcript, page 13, Sec. 14), "That the surface width shall be governed by the laws of U. S. A."

Whatever construction may be placed upon this provision of these regulations it is certain that it did not modify or repeal the local law then in existence fixing the width of claims.

All laws are construed by the same rules and interpreted by the same principles. No law of the United States was then in existence, fixing the width of claims, nor has there been since, except the provisions in Sec. 2320, which prescribed that they shall not exceed 600 feet in any case nor be less than 50 feet in

width, and leaving the width to be determined by the miners themselves within those limits. Such a regulation as the one of May 4th, 1872, would be incapable of application. It would, instead of being a regulation to fix the width, be a clear case of a regulation "how not to do it," and void. If it was intended to anticipate the action of Congress, it is an instance of premature action which turned out insufficient, for the reason that the act of Congress no more indicates the proper width at 600 feet than it does at 50 feet—in fact, the act clearly indicates the intention of Congress not to fix any width, but to remit that question to local regulation. As that regulation was then in existence, and no change has ever been made, it must control. If these regulations like customs merely in parol had been shown by the defendant to have been modified by the miners themselves, by proving that the former custom of taking up claims 200 feet wide had fallen into disuse, and that the custom, when this location was made by the defendant, was to locate claims 600 feet wide, there might be something in the argument. But here there was a written code of local laws in existence and of record—they have never been modified or repealed formally or by the customs of the locality. Any attempt to prove their abrogation by custom or in practice would have been as inadmissible as it was impossible. The law of 1870 has been and is observed in full force in Blue Ledge District to the present time. No miner is called to prove or attempt to prove that a single location aside from this one, covering 600 feet in width, has ever been attempted in the district. We insist, therefore, that this court must conclude that no lawful location could be made in this mining district which exceeded 200 feet in width.

On the binding force and effect of these local regulations or laws, we cite:

McCornick vs. Varnes, 2 Utah, 357.
Jupiter M. Co. vs. Bodie, 7 Sawyer Rep., 104.

If it be established that the laws in force in the district limited the claim to 200 feet in width, so much of the alleged Clara patent as professes to convey to the defendant the land in dispute is simply void—void for want of authority.

It will be noticed by a glance at the diagram that no part

of the ground in controversy is nearer than 200 feet of the centre line of the Clara claim; we insist the patent is void certainly for all embraced within it beyond the 200 feet from the centre of claim. What the effect might be on the 200, which the defendant would have been entitled to locate, we need not consider. The question is not involved here.

These points appear to us to be all that is vital in this case. If the land department with the local regulations before it, (as they must have been, for every application for patent *must* contain a copy of them) decided to issue a patent to a claim 600 feet wide, when these regulations limited all locations to 200 feet, it did so without authority of law, and its act, as against the plaintiff, is void. In such a case, on all the authorities in like cases, the party injured may, in reply to a title so derived, have his own title decreed lawful, and the fictitious one held for naught. This is our action and we confidently urge upon the court the reversal of the judgment rendered below in this case.

J. G. Sutherland

J. K. McBride